Supreme Court, U.S.
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No. 98-8

In The

Supreme Court of the United States

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, INC., *et al.*,

Petitioners,

v.

LOUISIANA WILDLIFE AND FISHERIES COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Louisiana Marine Resources Conservation Act of 1995 severely restricts the commercial catch of saltwater finfish by prohibiting the use of strike gill nets, outlawing weekend and nighttime commercial fishing, and eliminating strike netting of speckled trout, black drum, sheepshead, or flounder after March 1, 1997. The trial court found that, "This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that gill nets were damaging a particular species of fish." The Act places the entire burden of "conservation" on commercial fisheries, without consideration of less burdensome regulation of both recreational and commercial fishers. The court of appeal recognized "that Act 1316 has had a tremendous impact on the availability of saltwater finfish for markets both within the state of Louisiana and beyond the state's borders," but rejected petitioners' Commerce Clause challenge on the ground that "The incidental burden on interstate commerce merely reflects the Louisiana Legislature's response to the depletion of saltwater finfish in the waters of Louisiana."

Nothing in either the Legislative history of Act 1316's adoption or in the trial record on judicial review supports the court of appeal's reconstruction of the Act.

The question presented is thus:

WHETHER THE LOUISIANA MARINE RESOURCES CONSERVATION ACT OF 1995 ON ITS FACE AND AS APPLIED VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

Petitioners: Louisiana Seafood Management Council, Inc.; Delta Commercial Fisheries Association, Lawrence "Brother" Stipelcovich; Lake Pontchartrain Fishermen's Association; Peter Gerica; South Louisiana Finfishermen's Association; Oliver Kelley; Kelley's Seafood; Steve Hotoph; Batistella Seafood, Preston Batistella; Brightsen's Restaurant, Frank Brightsen; S.J. Sampey, d.b.a. Taban's Seafood; Gatory Fisheries, Jay Trotter; Landlock Trucking Company, Daniel Schicola; Dan's Seafood, Dan Thompson; Fishermen's Seafood, Willie F. Porter; P. L. Seafood, Tuna Fresh, Larry Loga; Piazza Seafood World, Sal Piazza; Louisiana Commercial Fishermen's Association; George Barisich; Gulf Coast Commercial Fishermen, Tracy Kuhns; Louisiana Seafood Exchange, Thomas Lusco; Benny Miller; Robert S. Fritchey; Concerned Shrimpers of Louisiana, "Tee John" Mialjevich.

Parent Companies and Subsidiaries: None.

Respondents: Louisiana Wildlife and Fisheries Commission; Louisiana Department of Wildlife and Fisheries.

Intervenor/Respondent: Coastal Conservation Association, d.b.a. GCCA of Louisiana.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Louisiana Seafood Management Council, Inc., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeal, State of Louisiana, No. 97 CA 1344, entered in this matter on September 1, 1998.

OPINIONS BELOW

The September 1, 1998 opinion of the Louisiana First Circuit Court of Appeal is reported at 719 So.2d 119 and is reprinted herein, Appendix, 1a, *infra*. The May 22, 1996 written reasons for judgment of the Nineteen Judicial District Court, Parish of East Baton Rouge is unreported and appears herein, 28a, *infra*. The January 9, 1997 written reasons for judgment of the same trial court, on petitioners' motion for new trial, is unreported and appears herein, 42a, *infra*. The May 19, 1998 opinion of the Louisiana Supreme Court reversing the trial court's judgment on petitioner's takings claim is reported at 715 So.2d 387 and is reprinted herein, 51a, *infra*.

JURISDICTION

The judgment of the Louisiana First Circuit Court of Appeal was entered on September 1, 1998. Rehearing in the First Circuit was denied on November 2, 1998, 71a, *infra*. The Louisiana Supreme Court denied certiorari on January 29, 1999, 72a, *infra*. By order dated April 20, 1999, MR. JUSTICE SCALIA for good cause shown extended the

time for filing for a writ of certiorari in this matter to and including June 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

Petitioners, commercial strike net fishermen, seafood wholesalers, truckers, restauranteurs, and their associations, sued in state court pursuant to 42 U.S.C. § 1983 claiming, *inter alia*, that Louisiana's "Marine Resources Conservation Act of 1995," Act 1316, violates the Commerce Clause of the United States Constitution. The Act severely restricts commercial strike netting of saltwater finfish by use of gill nets. The state trial court, after trial on the merits, found as a fact that, *"This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that the gill nets were damaging a particular species of fish."* 32a (our emphasis). The Louisiana Supreme Court, on the State's direct appeal of the trial court's condemnation of the Act on constitutional takings grounds, emphasized this finding of fact but said nothing about it, as petitioners' Commerce Clause claim was not a part of the State's direct appeal. Invoking a test of "rational speculation," 45a, the trial court later rejected petitioners' Commerce Clause claim without any mention of the scientific evidence of

record or any weighing of the impact on interstate and foreign commerce of Act 1316 against the State's purported "Conservation" goal and the availability of less drastic means to accomplish the State's recited purpose.

Meanwhile, federal District Court Judge G. Thomas Porteous condemned Act 1316's ban on commercial weekend strike netting as a violation of the Commerce Clause. *Louisiana Seafood Management Council, Inc. v. Foster*, 917 F. Supp. 439 (E.D. La. 1996) (issuing preliminary injunction).

On appeal, the Louisiana First Circuit Court of Appeal's Commerce Clause analysis begins with its recital, "We recognize that Act 1316 has had a tremendous impact on the availability of saltwater finfish for markets both within the state of Louisiana and beyond the state's borders." 17a. But for the Court of Appeal, it was sufficient to reject petitioners' Commerce Clause claim to recite, "This incidental burden on interstate commerce merely reflects the Louisiana Legislature's response to the depletion of saltwater finfish in the waters of Louisiana." Moreover, said the First Circuit Court of Appeal, "plaintiffs have not suggested any alternative statutory schemes which would more effectively accomplish the Legislature's goal of managing the State's stocks of saltwater finfish without a resulting nondiscriminatory incidental impact on commerce." 17a.

REASONS FOR GRANTING THE WRIT

Respectfully, because the Commerce Clause demands of state courts a more sensitive weighing of the State's

purported conservation purpose against the burden Act 1316 imposes on interstate and foreign commerce in saltwater finfish, with a keen eye on both the legislative and trial record, petitioners pray that a writ of certiorari issue in this case. It is not enough for trial court below to rely on "rational speculation" or for the Court of Appeal to reconstruct the legislative record, as we show below, in rejecting petitioners' Commerce Clause claim.

1. "There is something fishy about this case." *Maine v. Taylor*, 477 U.S. 131, 152 (1986) (Stevens, J., dissenting). Representative Triche, principal sponsor of Act 1316, is wrong under the Commerce Clause to say he does not need biological or scientific data, as he told the trial court, *viz.*: "I don't need any of that data to warrant any piece of legislation I introduce, sir." Record, p. 1239.[1] Representative Triche told the trial court: "I don't have anything that says the stocks are not healthy." R. 1238. And yet Act 1316 on its face forecloses any commercial catch by strike net of speckled trout, black drum, sheepshead, or flounder after March 1, 1997. La. R.S. 56:325.3(C)(1), 325.4(A).

The Commerce Clause, we submit, prohibits a State from purporting to "conserve" saltwater marine resources by severely restricting their commercial catch by strike-net fisheries, without any biological basis being shown in either the legislative record or on judicial review.

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[1] References are to the trial record, as lodged on appeal in the First Circuit Court of Appeal [hereinafter cited as "R. ___"].

It is the fact that the Louisiana Department of Wildlife and Fisheries own marine biologists informed the Legislature "The Department's position was that there was no need, no biological need, for a gill net ban; that the health of the fisheries resources, marine fishery resources, and the finfish in particular, were healthy." This was the trial testimony of John Roussel, the Department's own biologist. R. 977. Assistant Secretary Corkey Perret told the Legislature the same thing: "We have testified that from our work we feel that the speckled trout resource or the spotted seatrout resource is in a healthy condition. Perret Deposition, Plaintiffs' Exhibit P-1, p. 28; black drum "is in an extremely healthy state."[2] *Id.*, p. 29.

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[2] Indeed, there are so many black drum these days that they are eating Louisiana's prized oysters. Louisiana House Concurrent Resolution No. 34, First Extraordinary Session, 1998, urges and requests of the Department of Wildlife and Fisheries "to develop a program to control and prevent the problem of black drum predation upon oysters on leases in its state in their battle against the expanding populations of black drum. HCR No. 34 solemnly recites: "WHEREAS, unchecked growth of the populations of certain species of fish has other consequences which were not necessarily anticipated at the time of enactment of the 'Louisiana Marine Resources Conservation Act of 1995' such as increased predation by growing populations of species of fish on other fish and marine animals such as oysters and shellfish; and WHEREAS, a prime example of such unanticipated consequences of the 'Louisiana Marine Resources Conservation Act of 1995' is the large expansion of the black drum population along Louisiana's coastline with the resultant predation increase by the black drum on the oyster population on both the public and private leases. . . . "

The Department of Wildlife and Fisheries Secretary, Joe Herring, testified that Act 1316 "is one of the most ill-prepared fish and wildlife related legislative instruments I have seen in the past – I have seen passed in my 40-plus years in government." R. 1020. Herring continued: "[B]ut the present rate that we're going with the present laws in effect that the fish resource has been increasing. So with that, then, the net would not be having the detrimental effect on that resource that a lot of people have said." R. 1024-25.

This, we submit, explains the trial court's finding of fact, emphasized by the Louisiana Supreme Court on its first encounter with this case, 56a, *infra*, *"This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that the gill nets were damaging a particular species of fish."*

2. Next, the legislative and judicial records establish without contradiction that commercial strike-netting poses no threat to Louisiana's marine resources. This was the expert testimony of Drs. William Herke and H. Dixon Hoese, eminent Louisiana State University and University of Southwest Louisiana fishery biologists. Herke Deposition, Plaintiffs' Exhibit P-2, p. 43. Dr. Hoese, using his experimental gill net at trial, explained how a gill net

> physically cannot be indiscriminate. As you can see, this has a particular square mesh size. This mesh size is designed to take a particular size of fish. The word has come out – in fact its in the bill – that these are indiscriminate entanglers. . . . These have been used for as long as there has been fisheries management, which is quite a few years, to manage populations

> because you can be very much size selective, but they are certainly not indiscriminate entanglers. In fact, the law contradicts that. The law says that we can regulate pompano by having certain size – net sizes, by certain mesh sizes.

R. 1039. John Roussel, Acting Administrator for the Marine Fisheries Division of the Louisiana Department of Wildlife and Fisheries, with sixteen years' experience, was asked, "Are gill nets a threat to 12-inch speckled trout, in your opinion, in your expert opinion?" He answered: "Legal mesh size gill nets in Louisiana are not. They are selective for fish larger than 12 inches." R. 998.

Peter Gerica, Steve Hotoph, and other plaintiffs are target gill net fishermen. They do not oppose Act 1316's ban of set nets. R. 785, 1054, 1067. As to target gill net fishers, Colonel Clark, Assistant Chief of Wildlife and Fisheries Enforcement Division, testified regarding whether gill nets are indiscriminate:

"A. They're exactly what's been told in this court that I have heard. They're selective as to the size especially if the fish are around but – and they're not selective in the species unless they're targeted. . . .

"A. [A]n individual who goes out and sees that fish, whether it be a pompano or whether it be a trout, and striking what he sees. *That's almost a hundred percent.*"

R. 1311 (our emphasis).

Representative Triche testified before the trial court that gill nets are *not* indiscriminate:

"Q. You will agree with me that commercial fishing demands some type of efficiency?

"A. Well, I guess in order to be profitable you have to have efficiency, yes, sir.

"Q. And gill nets are certainly efficient means of gathering fish for commercial purposes, correct?

"A. Well, I think you have to add another adjective in there. They are highly efficient and as far as I'm concerned they are too efficient.

"Q. But they can discriminate as to size and often sometimes species, correct?

"A. Sure." R. 1251-52.

3. All expert testimony of record shows no rational relationship between the supposed conservation aim of Act 1316 and the drastic impact upon commercial saltwater finfisheries of Act 1316's severe restrictions upon the use of what the record shows is an efficient, effective means of commercial catch without any real threat to Louisiana's saltwater marine resources. Thus: –

"Q. Dr. Herke, do you have an expert opinion on the relationship between preserving marine natural finfish resources and Act 1316's ban or abridgment of the use of gill nets?

"A. I don't think it's necessary. Herke Deposition, p. 43.

"Q. Is there any rational relationship between the imposition of the ban of gill nets as it's laid out in this act and conserving marine resources?

"A. Not really." *Id.*

Most amazingly, Intervenor Gulf Coast Conservation Association's expert biologist Dr. Richard Condrey testified that Act 1316 is *not* necessary to conserve Louisiana's finfish resources, *viz.*:

"Q. Do you think that a ban on the gill net is necessary to conserve resources, Dr. Condry?

"A. The ban on gill nets is necessary to conserve resources? *No.*" R. 1366 (our emphasis).

4. The court of appeal states, "Act 1316 was enacted pursuant to the state's police powers as a conservation measure." 21a. But without a biological threat to any of the species in question – and this was the solemn finding of the trial court – Act 1316 hardly accomplishes its purported aim – "The Marine Resources Conservation Act of 1995" – by outlawing what the record shows is an effective means of commercial fishery, *viz.*:

"Q. I'm trying to understand your definition of conservation. Is it your opinion that if a law was passed which essentially says that no fish can be caught, that that's – that that doesn't meet your definition of conservation?

"A. Not if there's enough of a population out there to be able to sustain the harvest." R. 644-45 (Dr. Herke).

Not one expert testified that Act 1316 constitutes a "conservation" measure from the point of view of "wise use" of fisheries resources, which we submit the Commerce Clause requires. "This Court will determine for itself what the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or

characterization given it by the legislature or the courts of the State will not necessarily control. Regard must be had to the substance of the measure rather than to its form." *Lacoste v. Dept. of Conservation of the State of Louisiana*, 263 U.S. 545, 550 (1924). All expert testimony of record shows no rational relationship between the supposed conservation aim of Act 1316 and the drastic "practical impact of the law," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

5. Act 1316 substitutes a commercial rod and reel license in place of strike nets after March 1, 1997. But the expert testimony was unanimous that the rod and reel is an impossible gear to take mullet, sheepshead, drum, pompano, and flounder in commercially viable quantities. Perret Deposition, p. 30 ("Sheepshead is a species that I don't feel can be taken in any significant quantity with that type of gear, the rod and reel."); *id.*, p. 63 ("you just simply cannot take any volume of mullet with a rod and reel"); R. 1017 (Roussel), 1043 (Hoese).

6. Having found the requisite "tremendous impact" on interstate and foreign commerce, 17a, the court of appeal's next factual step in its Commerce Clause analysis is demonstrably fictitious. The court of appeal's recital, "The incidental burden on interstate commerce merely reflects the Louisiana Legislature's response to the depletion of saltwater finfish in the waters of Louisiana," 17a, is manifestly contrary to the legislative record, to the trial testimony of the legislative sponsors of Act 1316 and the Department of Wildlife and Fisheries own officials and marine biologists, and to the scientific evidence of record, which must be considered under federal Commerce Clause jurisprudence. "The late appearance of this argument and the total absence of any record support for

the questionable factual assumptions that underlie it give it the flavor of a post hoc rationalization." *Hughes v. Oklahoma*, 441 U.S., at 338 n.20.

Respectfully, this Court's Commerce Clause jurisprudence forbids the court of appeal's reconstruction of the record. *Lacoste v. Dept. of Conservation of the State of Louisiana*, 263 U.S. 545 (1924); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 771 (1945); *Kassel v. Consolidated Freightways, Inc.*, 450 U.S. 662 (1981). The First Circuit Court of Appeal's conclusion necessarily falls in turn: "On this record, we are persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to [marine resources conservation]." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447 (1978).

7. The record testimony overwhelmingly shows a substantial, devastating burden upon interstate and foreign commerce in saltwater finfish, particularly mullet as food fish. Karl Turner, Executive Director of the Louisiana Seafood Promotion and Marketing Board, testified as an expert that this market – in the millions of pounds and millions of dollars – "would be crushed. Not eroded, but eliminated." R. 1098. "Mullet is caught primarily at night, as much as 90 percent of it at night. This bill for no apparent biological reason strips the right to fish at night." R. 1114.

Tested by the scientific evidence of record, Act 1316 violates the federal Commerce Clause: "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Hughes v. Oklahoma*, 441

U.S., at 331 (1979), quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Hughes v. Oklahoma*, 441 U.S., at 331.

It is ironic, to say the least, that the court of appeal should say, "plaintiffs have not suggested any alternative statutory schemes which would more effectively accomplish the Legislature's goal of managing the State's stocks of saltwater finfish without a resulting nondiscriminatory incidental impact on commerce." 18a. To the contrary, as we pointed out in our Reply Brief filed in the Court of Appeal, p. 1 n.1:

> "Not one person, not one person will testify that the fisheries are in any danger whatsoever. The only person who comes close is Richard Condrey. . . . *his recommendation is increase the minimum size for recreationals* because they are the ones that are killing the juvenile fish. Their expert, their expert. But I know power and I know money and I know numbers."

Senate Natural Resources Committee, Transcript of Hearing, May 25, 1995, p. 66 (Mr. Fernandez) (our emphasis).[3]

8. As to petitioners' Commerce Clause challenge to Act 1316's ban on weekend commercial fishing, nothing in the state court opinions below address federal District

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[3] Transcripts of the House and Senate Natural Resources Committee hearings were introduced at trial by joint stipulation of the parties.

Court Judge G. Thomas Porteous's condemnation of the weekend ban, *viz.*:

> No viable conservation objective can be accomplished by prohibiting commercial fishermen from weekends but allowing recreational fishermen exclusive access to a public resource. Both categories of fishermen an pose a threat to marine resources and there is no conservation reason to ban only one on the weekends.

Louisiana Seafood Management Council, Inc. v. Foster, 917 F. Supp. 439, 445 (E.D. La. 1996) (footnote omitted).[4] Comity, we submit, requires some reasoned rejection of Judge Porteous's holding. The courts below offer none.

The court of appeal says, "The record establishes that the restriction of commercial fishing on weekends assists in the effective enforcement of DWF regulations. . . . " 22a n.10. What the record actually shows, however, is that:

"A. Understand that there are two kinds of fisheries. There are the strike net fishery for which Act 1316 requires that, generally speaking, law enforcement has not had too much problem with because it is an individual identifying a fish striking a net on it."

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[4] Later, Judge Porteous stayed the federal suit, to await a final decision in state court. *Louisiana Seafood Management Council, Inc. v. Foster*, 926 F. Supp. 579 (E.D. La. 1996). And, as we prepare this certiorari petition, we await Judge Porteous's ruling on plaintiffs' motion for new trial objecting on due process grounds to his order dismissing the federal suit on res judicata/collateral estoppel grounds.

This from the State's Chief Law Enforcement expert, Lt. Col. Charles Clark. R. 940. Colonel Clark also admitted that no law enforcement rationale for banning weekend commercial fishing was presented to the Legislature. "Not in the actual making of the law, no." R. 924. Colonel Clark added: "[B]ut from an enforcement perspective our patrols are on the water on the weekend." Supplemental Record, Vol. 7, p. 1308.

Why not, then, simply enforce the fisheries laws equally against both recreational and commercial fishermen? Nor is ease of law enforcement a just explanation for banning all weekend and nighttime commercial strike-net fisheries (1,017 licensees in 1994) while allowing some 400,000 recreational fishers to fish both weekends and nights throughout the year. The court of appeal's law enforcement rationale is not only overbroad and unduly oppressive, but it hardly comports with Judge Porteous's sensible conclusion under the Commerce Clause.

9. The Commerce Clause, we respectfully submit, stands as a shield against Act 1316's specific purpose to eliminate an efficient gear without any showing of a real threat to the State's saltwater finfish resources. It is not enough, under federal Commerce Clause scrutiny, simply to invoke the purported aim of Act 1316, "The Marine Resources Conservation Act of 1995," without a sensitive judicial weighing and balancing of the burden imposed upon interstate commerce, the putative benefits actually received, and the availability of less drastic alternatives. *Lacoste v. Department of Conservation of the State of Louisiana*, 263 U.S. 545, 550 (1924). *Hughes v. Oklahoma*, 441 U.S., at 337-338.

This Court and lower federal appeals courts have always looked to the evidence of record, especially expert scientific opinion, in weighing the state's interest in conservation of its marine resources against the abridgment of interstate commerce. *Hughes v. Oklahoma; Maine v. Taylor*, 477 U.S. 131 (1986); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1310, 1308 (2d Cir. 1994).

Here, the expert scientific testimony of record confirms that Act 1316's severe restriction of commercial strike netting, of weekend and nighttime fishing, of seasons, and of commercial species[5] is unrelated to any legitimate interest in "conservation" of saltwater finfish resources permitted under the Commerce Clause. Drs. Herke, Hoese, and Wildlife and Fisheries marine biologist John Roussel all testified that strike gill nets are an efficient and effective means of commercial fishery that pose no threat to Louisiana's healthy stocks of speckled trout, pompano, drum, mullet, and flounder.

CONCLUSION

We respectfully submit that Louisiana is not free to breach the wall of the Commerce Clause by "cloaking objectionable legislation in the currently fashionable garb of environmental protection." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 285 n.21 (1977). And more:

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[5] Act 1316 prohibits any commercial catch by strike net of speckled trout, black drum, sheepshead, or flounder after March 1, 1997. La. R.S. 56:325(C)(1), 325.4(A).

> the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutory purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In the Court's recent unanimous opinion in *Raymond*, we declined "to accept the State's contention that inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce. 434 U.S., at 443. This "weighing" by a court requires – and indeed the constitutionality of the state regulation depends on – "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.*, at 441. . . .

Kassel v. Consolidated Freightways, Inc., 450 U.S. 662, 670-71 (1981).

Guided by the expert scientific testimony of record, a sensitive weighing of Act 1316 leads to the conclusion that the Act, as applied, violates the Commerce Clause. The courts below erred as a matter of law in rejecting petitioners' Commerce Clause attack upon Act 1316 on the scientific evidence adduced below. The trial court and the court of appeal's mere surface skimming of Act 1316 is constitutionally deficient under this Court's Commerce Clause jurisprudence. *Hughes v. Oklahoma, Maine v. Taylor.*

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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25 June 1999

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On Petition For a Writ of Certiorari To the First Circuit Court of Appeal State of Louisiana

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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97 1344 (La.App. 1 Cir. 9/1/98)

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, et al.

v.

LOUISIANA WILDLIFE AND FISHERIES COMMISSION, et al.

No. 97 CA 1344.

Court of Appeal of Louisiana,
First Circuit.

Sept. 1, 1998.

Rehearing Denied Nov. 2, 1998.

Robert Barnett, New Orleans, Paul Baier, Baton Rouge, for Plaintiffs/Appellants Louisiana Seafood Management Council, et al.

Frederick Whitrock, T. Michael Landrum, E. Wade Shows, Baton Rouge, for Defendants/Appellees State of Louisiana, Department of Justice, Wildlife & Fisheries Commission, Wildlife & Fisheries Department.

Thomas Balhoff, Baton Rouge, for Intervenor/Appellee Coastal Conservation Association, d/b/a Gulf Coast Conservation Association.

Before FOIL and KUHN, JJ. and CHIASSON[1], J. Pro Tem.

KUHN, Judge.

By judgment dated February 18, 1997, the trial court permanently enjoined several portions of Act 1316 of the

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[1] Judge Remy Chiasson, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

1995 Regular Session of the Louisiana Legislature ("Act 1316"), entitled the Louisiana Marine Resources Conservation Act and colloquially called the "gill net ban" law.[2] The remainder of Act 1316 was determined to be constitutional. This is an appeal by plaintiffs from that portion of the judgment which concludes the remainder of Act 1316 is constitutional and which denies permanent injunctive relief. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs consist of licensed commercial saltwater fishermen, associations composed of commercial fishermen, commercial seafood marketing interests, seafood wholesalers, seafood retailers, restaurateurs who sell seafood, and seafood consumers. On August 11, 1995, plaintiffs filed a petition seeking injunctive and declaratory relief, averring that Act 1316 was unconstitutional under both the Louisiana and the United States Constitutions. Plaintiffs additionally requested certification of the lawsuit as a class action.[3] Accompanying the petition was a

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[2] Louisiana Acts 1995, No. 1316 amended and reenacted significant sections of Title 56 of the Revised Statutes.

[3] Plaintiffs assert that the trial court erred in limiting certification of this lawsuit as a class action to those plaintiffs "who were either licensed or permitted to fish commercially when Act 1316 went into effect," and urge that the class be broadened to include those involved in the fishery operations. This court has articulated that the standard of review for certification of class actions is two-fold. The factual findings are reviewed under the manifest error/clearly wrong standard; the trial court's discretionary judgment on whether to certify the class or not is reviewed by the abuse of discretion standard.

request for a temporary injunction seeking to restrain defendants, the Department of Wildlife and Fisheries ("DWF") and the Louisiana Wildlife and Fisheries Commission ("the Commission"), from enforcing the provisions of Act 1316. The trial court signed the judgment ordering the temporary injunction on August 14, 1995, and set the hearing for a preliminary injunction for August 31, 1995. During the interim, Coastal Conservation Association d/b/a Gulf Coast Conservation Association, permissively intervened in the litigation. After adducing evidence at the hearing for the preliminary injunction, the trial court denied the plaintiffs the requested relief.[4]

Boudreaux v. State, 96-0137, p.5 (La.App. 1st Cir. 2/14/97); 690 So.2d 114, 119. In this case, the trial court apparently determined that the representatives of the fishery operations do not share a common character with those representatives of the commercial fishermen sufficient to warrant the broad certification plaintiffs requested. The common character element restricts class actions to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Id.* at p.7; 690 So.2d at 120. We cannot say the trial court erred in its conclusion that those in the fishery operations are not similarly situated with those licensed/permitted commercial fishermen effected by the enactment of Act 1316. Accordingly, we find no abuse of the trial court's discretion in declining to certify the class to include those in the fishery operations.

[4] The trial court expressly reserved judgment on plaintiffs' allegations of violations under the Commerce Clause of the United States Constitution and the takings clause of the Louisiana Constitution until the trial on the permanent injunction.

A two-day trial on the merits for the permanent injunctive relief commenced on February 27, 1996. By judgment dated June 19, 1996, the trial court permanently enjoined *inter alia* § 13.1 of Act 1316, concluding these provisions were unconstitutional.[5] Thereafter, plaintiffs filed a motion for a partial new trial. On February 18, 1997, the trial court signed a judgment concluding § 305 B(14)(a) of Act 1316 likewise was unconstitutional. In all other respects, the trial court found Act 1316 to be constitutional. The trial court severed §§ 13.1 and 305 B(14)(a) from the remainder of the act, and denied plaintiffs further injunctive relief as to the remaining provisions. A direct appeal from that portion of the judgment declaring unconstitutional the several provisions of Act 1316 was taken to the Louisiana Supreme Court.[6] This appeal addresses plaintiffs' contentions relative to the remaining portion of Act 1316, which the trial court concluded was constitutional.

The Louisiana Supreme Court's Determination

On May 19, 1998, the Louisiana Supreme Court issued an opinion reversing the trial court's conclusion

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[5] Although the trial court also concluded that §§ 305 B(4)(b) and 305.5 B were unconstitutional, the Legislature's 1997 repeal of La. R.S. 56:305 B(4)(b) and amendment of La. R.S. 56:305.5 B rendered moot the issue of whether those two sections of Act 1316 were in violation of the Commerce Clause of the United States Constitution. *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Comm'n*, 97-1367, p.2, n.6 (La.5/15/98); 715 So.2d 387, n.6.

[6] *See* La. Const. Art. V, § 5(D).

that §§ 13.1 and 305 B(14)(a) of Act 1316 were unconstitutional. *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Comm'n*, 97-1367 (La.5/19/98); 715 So.2d 387. The Supreme Court explained the provisions of Act 1316 as follows.

> Act 1316 of 1995 significantly restricted the use of gill nets by commercial fishermen in Louisiana waters. The principal limitations were on the manner in which gill nets can be used. The Act restricts a commercial fisherman to the use of one "strike net" [a gill net which is not attached to the bottom and which is actively fished] and, after a two-year phase-in period, to the taking of mullets and pompano. And even for those species, the periods of time during which fish can be taken were significantly limited. (Footnote incorporated into quoted text.)

Id. at pp. 1-2; 715 So.2d at 389.

Addressing the issue of whether the trial court erred in its conclusion that § 13.1 of Act 1316 violated the prohibition against the taking of property without just compensation set forth in Art. 1, § 4 of the Louisiana Constitution, the Supreme Court noted, "The lack of any property interest in the fish of the waters is well-settled, statutorily and judicially." *Id.* at p.8; 715 So.2d at 392. The court rejected plaintiffs' theory that the gill net restrictions imposed by Act 1316 amounted to a taking of capital investment, explaining that "economic restraints generally do not rise to the level of a taking." *Id.* Turning to the assertion by plaintiffs that the Legislature's enactment in 1986 of a commercial "right to fish" gave them a justifiable investment-backed reliance interest in the right to fish, the Supreme Court examined the provisions of La.

R.S. 56:640.3, as enacted in 1986. Framing the issue as "whether commercial fishermen were vested in 1986 with an incorporeal right to fish with currently legal methods unless biological data supports an alteration of that right," the Supreme Court held that they were not so vested. Because the trial court erroneously premised its conclusion that § 13.1 of Act 1316 was in violation of La. Const. Art. 1, § 4 on the finding that plaintiffs possessed a vested incorporeal right to fish commercially, the Supreme Court determined that Act 1316 did not result in the taking of any property right possessed by the plaintiffs, and reversed the trial court's declaration that § 13.1 was unconstitutional. *Id.* at p.13; 715 So.2d at 394. Thus, the Supreme Court concluded that plaintiffs were not entitled to any compensation for their displacement by the restrictions to gill net use contained in Act 1316.[7]

The Supreme Court also reviewed the trial court's conclusion that the requirement set forth in § 305 B(14)(a) of Act 1316 (that applicants for commercial rod and reel licenses must provide positive proof that they held a valid commercial gear license for gill nets during any two of the years 1995, 1994, and 1993) was unconstitutional on equal protection grounds. In reversing the trial court, the

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[7] In this appeal, plaintiffs assigned as error the trial court's denial of lost income from their claim of entitlement to just compensation for the taking of their property. Because the Supreme Court has determined that Act 1316 did not result in the taking of any property right possessed by plaintiffs, the issue of plaintiffs' entitlement to additional compensation has been rendered moot. Accordingly, we do not address plaintiffs' contentions on this point.

Supreme Court held that the appropriate level of constitutional scrutiny was the rational basis standard, noting that the licensing regulation at issue is of an economic nature. *Id.* at p.14; 715 So.2d at 395. Finding that the apparent purpose of the new rod and reel license is "to mitigate the hardship caused by Act 1316 on former gill netters by allowing an alternative means of commercial fishing for those who previously used gill nets," the Supreme Court concluded the classification contained in § 305 B(14)(a) has a rational basis. The trial court's ruling to the contrary was reversed. *Id.* at p.15; 715 So.2d at 395.

Against this backdrop, we turn to those contentions raised in this appeal which remain viable in the wake of the Supreme Court's reversal of the trial court's declaration that several portions of Act 1316 were unconstitutional.

ISSUES

The issues raised by plaintiffs in this appeal are as follows.

(1) Whether Act 1316 violates Article IX, § 1 (the Public Trust Doctrine) of the Louisiana Constitution;

(2) Whether Act 1316 violates the Commerce Clause of the United States Constitution; and

(3) Whether Act 1316 denies plaintiffs due process and equal protection of the laws.

PUBLIC TRUST DOCTRINE

Article IX, section 1 of the Louisiana Constitution sets forth this state's Public Trust Doctrine and provides:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy.

Plaintiffs assert that Louisiana's Public Trust Doctrine mandates equitable distribution of the saltwater finfish resources among fishermen, and that the failure of the Legislature to produce evidence demonstrating that the enactment of Act 1316 was based upon careful scientific investigation of the best scientific information available amounts to a violation of Art. IX, § 1 of the Louisiana Constitution. Buttressing this assertion with the provisions of La. R.S. 56:640.3 prior to its amendment by Act 1316, plaintiffs contend commercial fishermen were vested with an incorporeal right to fish using currently legal methods of harvesting fish unless biological data supports an alteration of that right.

Prior to the enactment of Act 1316, La. R.S. 56:640.3 provided:

> A. The legislature recognizes that legal methods to harvest any species of fish should not create a severe economic and personal hardship on the fishermen using said method. The legislature hereby declares that restrictions on legal methods to harvest finfish, shrimp, oysters, crabs, or any other species of fish should be

recommended by the Louisiana Department of Wildlife and Fisheries.

B. The department shall recommend the elimination of a presently legal method to harvest fish only if any species of fish affected by that harvesting method will be damaged without the elimination of that method. The department shall base its recommendation on biological data which may be obtained by any method and from any source the department deems appropriate.

C. Upon introduction of any instrument which eliminates a legal method to harvest fish commercially, the House or Senate Committee on Natural Resources should request a recommendation from the department. The department shall present a recommendation to the committee based on its findings from the biological data no later than the opening of the next regular session of the legislature.

(Footnote omitted.)

In conjunction with plaintiffs' contention that Act 1316 amounted to the taking of their property by the state without just compensation, the Louisiana Supreme Court examined the provisions of § 640.3. Reversing the trial court's determination that § 640.3 vested plaintiffs with an incorporeal right to fish commercially, the Supreme Court rejected plaintiffs' assertion that the statute mandated the Legislature to seek a recommendation, based on biological data, from DWF prior to the alteration of any legal method of fishing, *Louisiana Seafood Management Council*, 97-1367 at p.11; 715 So.2d at 393, and concluded

former § 640.3 was "merely a hortatory provision directing that the Legislature, as a policy matter, seek a recommendation from [DWF]." *Id.* at p.13; 715 So.2d at 394. Thus, former § 640.3 did not require the Legislature to produce evidence based on biological data prior to enacting Act 1316, which undisputedly altered the legal methods of commercial fishing.

Plaintiffs maintain that La. R.S. 56:638.1-638.5 evinces the Legislature's previous recognition of "its Public Trust stewardship of Louisiana's saltwater finfish resources." In so contending, plaintiffs suggest that the purposes, policy and standards set forth in La. R.S. 56:638.3-638.5 are "part and parcel of Louisiana's Public Trust Doctrine," and urge that the Legislature in enacting Act 1316 failed to adhere to those statutory provisions in furtherance of its duty to implement the Public Trust Doctrine.

We note initially that Art. IX, § 1 mandates that the natural resources of this state be protected, conserved, and replenished. To this end, Article IX, § 1 directs the Legislature to implement laws in furtherance of this mandate "consistent with the health, safety and welfare of the people." In order to fulfill the mandate of the Public Trust Doctrine, given the very nature of use of natural resources, the Legislature may find it necessary from time to time to make adjustments to previously-enacted laws in response to the changes in the variations of natural resources resulting from the use or conservation of those resources. In enacting Act 1316, we are convinced the Legislature simply revisited its constitutional duty set forth in Art. IX, § 1 in light of the adjusted levels of the natural resources (in this case saltwater finfish) which

resulted from the use of those resources in conformity with earlier laws and enacted the legislation with the purpose of protecting and replenishing this natural resource.

We turn now to plaintiffs' contention that the Legislature is bound to adhere to the purposes, policies and standards set forth in Sections 638.3-638.5. Clearly, the respective mandates contained in the plain language of §§ 638.3 and § 638.5[8] are expressly directed to the

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[8] La. R.S. 56:638.3, entitled "Purposes," provides:

In order to implement the objectives and purposes of this Subpart [L], the commission shall:

(1) Take timely action to conserve and manage saltwater finfish species.

(2) Promote the use of sound conservation and management principles in the regulation of commercial and recreational fishing.

(3) Actively advocate, on behalf of the saltwater finfish constituency, improvement of or no net loss of the functionality and value of the saltwater fisheries' habitat and estuary.

(4) Provide for the preparation and implementation of fishery management plans, in accordance with this policy that will prevent overfishing and will achieve and maintain plentiful fish populations to ensure, on a continuing basis, the optimum yield from each fishery.

(5) Recognize that saltwater finfish populations are subject to both natural and man-induced increases and decreases, and that changes in harvest levels may need to be recommended. If changes are required, these increases and decreases should be distributed among all fishermen in a fair and equitable manner that considers among other factors historical usage,

Commission. Thus, plaintiffs' reliance on either of these statutes to buttress their assertion that the Legislature's

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ensuring that no historical user groups will be arbitrarily excluded.

La. R.S. 56:638.5, entitled "Saltwater fishery standards," sets forth the following:

> The commission shall adopt such rules and regulations, consistent with the authority granted by this Chapter, and in accordance with the Administrative Procedure Act, for the harvesting, conservation, and management of all species of saltwater finfish, in accordance with the following standards:
>
> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield while maintaining healthy, plentiful stocks. In fact, every effort will be made at all times to prevent a harvest from exceeding the safe upper limit of harvests which can be taken consistently year after year without diminishing the stocks so that the stock is truly inexhaustible and perpetually renewable.
>
> (2) Conservation and management measures shall be based upon the best scientific, economic, biological, anthropological, and sociological information available.
>
> (3) To the extent practicable, an individual stock or unit of fish shall be managed as a unit throughout its range within the state's jurisdictional authority and interrelated stocks of fish or other saltwater resources shall be managed in close coordination.
>
> (4) If it becomes necessary to allocate or assign fishing privileges among various fishermen, such allocations to the extent practicable shall be:
>
> (a) Fair and equitable to all such fishermen.

enactment of laws in furtherance of the mandate contained in Art. IX, § 1 is constrained by these statutory provisions is misplaced.

Louisiana Revised Statutes 56:638.4, entitled "Policy," states:

> The policy of the state of Louisiana is hereby declared to be the following:
>
> Stewardship of the state's saltwater finfish resources shall have as its utmost concern the continued health and abundance of the resource and its environs, shall provide for optimum sustained benefits to the state, shall be responsive to the needs of interested and affected citizens, shall ensure the proper and fair utilization of these resources for citizens of the state in present and future generations, shall preserve the state's exclusive right to manage the fisheries

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(b) Reasonably calculated to promote conservation.

(c) Carried out in such a manner that no particular individual, corporation, or other legal entity acquires an excessive share of such privileges.

(d) In the best interest of the citizens of Louisiana.

(5) Conservation and management measures shall, where practicable, promote efficiency in the conservation and management of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(7) Conservation and management measures may take into account and allow for variations among, and contingencies in, fisheries resources and catches.

> within or beyond its jurisdiction, and shall be based on the best scientific information available. In addition, such stewardship of the state's saltwater finfish resources shall draw upon federal, state, and academic capabilities and promote efficiency in carrying out research, administration, management, and enforcement.

The entirety of Subpart L of Part VII of Title 56, which contains § 638.4, was enacted by Acts 1991, No. 708, § 1. Given the placement of § 638.4 in Subpart L of Part VII of Title 56 and reading Subpart L as a whole, we are convinced that § 638.4 is likewise directed to the Commission.

Moreover, we are mindful of Louisiana Civil Code article 13 instructing that laws on the same subject matter must be interpreted in reference to each other. Louisiana Revised Statutes 56:3 states that "ownership and title to all . . . fish are and remain the property of the state, and shall be under the exclusive control of the [Commission]. . . . " Reading § 3 *in pari materia* with § 638.4, it is evident that the stewardship directive of § 638.4 is addressed to the Commission. In a tripartite system of government, the powers of the three branches are separate: the legislature enacts laws, the executive executes laws, and the judiciary applies laws. *Murrill v. Edwards*, 613 So.2d 185, 189 (La.App. 1st Cir.), *writ denied*, 614 So.2d 65 (La.1993). The control and supervision of the wildlife of the state, including all aquatic life, is vested in the Commission, which is within the executive branch of government. La. Const. Art. IX, § 7; La. R.S. 36:601; La. R.S. 56:1. Stewardship is defined as "the careful responsible management of something . . . entrusted to one."

Webster's Third New International Dictionary 2240 (1993). We find the concept of stewardship inconsistent with the function of the Legislature. This interpretation, concluding that § 638.4 is directed to the Commission rather than to the Legislature, harmonizes any possible conflict with § 3 when the two statutes are read *in pari materia*, and is congruent with the express mandate that the Legislature "shall enact laws" in furtherance of the policy set forth in Art. IX, § 1.[9]

COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides, "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . " and

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[9] Plaintiffs urge the inequitable allocation of saltwater finfish resources between commercial and recreational fishermen violates the Public Trust Doctrine contained in Art. IX, § 1 of the Louisiana Constitution, as well as the standards set forth in La. R.S. 56:640.3, as enacted pursuant to Act 1316. The trial court rejected plaintiffs' Public Trust Doctrine claim at the close of plaintiffs' case-in-chief on the permanent injunction and granted defendants' oral motion for involuntary judgment. While plaintiffs offered evidence suggesting that recreational fishermen collectively caught a larger quantity of fish than commercial fishermen, that was countered by defendants' evidence (adduced at the hearing on the preliminary injunction and duly admitted into the record at the trial on the permanent injunction) indicating that examination of quantity of fish caught did not take into consideration the total poundage of fish harvested by commercial fishermen compared with that of recreational fishermen or the effect of underreporting of commercial fish harvests. Accordingly, we cannot say the trial court was erroneous in concluding that plaintiffs failed to meet their burden of proving inequitable allocation.

reflects a central concern of the Framers to the Constitution: "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34, 69 S.Ct. 657, 662-63, 93 L.Ed. 865 (1949). The Commerce Clause has accordingly been interpreted not only as authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation. *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979).

Plaintiffs contend the evidence shows that through its enactment of Act 1316, the state of Louisiana has imposed a substantial burden on interstate and foreign commerce without any showing of a real and legitimate conservation purpose, and as such "is bad under the Commerce Clause" of the Constitution of the United States.

When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, states are nonetheless limited by the Commerce Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 727, 66 L.Ed.2d 659 (1981). The United States Supreme Court has articulated that under the general rule governing Commerce Clause challenges, we must inquire (1) whether the challenged legislation regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the legislation serves a legitimate local purpose;

and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Id.*, 441 U.S. at 336, 99 S.Ct at 1736.

The "incidental burden on interstate commerce" appropriately considered in a Commerce Clause analysis is the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce. It is a comparative measure. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir.1987). Where the burden on out-of-state interests is no different from that placed on competing in-state interests, it may be said to be a burden on *commerce*, rather than a burden on *interstate* commerce. *Id.* at 406. The Commerce Clause is concerned with protectionism and the need for uniformity and legislation will not be invalidated in the absence of *discriminatory* burdens on interstate commerce. *Id.*

In the case *sub judice*, plaintiffs have not proven and, on appeal, do not assert that Act 1316 imposes a discriminatory burden on *interstate* commerce. We recognize that Act 1316 has had a tremendous impact on the availability of saltwater finfish for markets both within the state of Louisiana and beyond the state's borders. Through restrictions on the use of gill nets in the harvesting of saltwater finfish, Act 1316 simply removes from the stream of commerce the quantity of saltwater finfish available as articles of commerce. Since we have concluded that Act 1316 does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Louisiana legislation "is clearly excessive in relation to the putative local benefits." *Minnesota*, 449 U.S. at 472, 101 S.Ct. at 728.

Saltwater finfish (and their byproducts) continue to move freely across the Louisiana state border even though, through Act 1316's modification in the legal methods of harvesting saltwater finfish, the available quantities may be less bountiful. This incidental burden on interstate commerce merely reflects the Louisiana Legislature's response to the depletion of saltwater finfish in the waters of Louisiana. Act 1316 does not burden out-of-state interests more heavily than saltwater finfish interests within the state of Louisiana. States have a substantial interest in environmental protection and resource conservation. *Id.*, 449 U.S. at 471, 473, 101 S.Ct. at 727, 729. Based on this record, we find that the nondiscriminatory incidental burden on commerce produced by the restrictions of gill nets in the commercial harvesting of saltwater finfish imposed by Act 1316 is not clearly excessive in relation to the local benefits, i.e., preservation of the various species of saltwater finfish found in Louisiana's waters. Moreover, plaintiffs have not suggested any alternative statutory schemes which would more effectively accomplish the Legislature's goal of managing the State's stocks of saltwater finfish without a resulting nondiscriminatory incidental impact on commerce.

State regulation, based on police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960). We find no error in the trial court's implicit rejection of plaintiffs' claim that Act 1316 substantially burdens interstate commerce in derogation of the Commerce Clause of the Constitution.

EQUAL PROTECTION/DUE PROCESS

Statutes are presumed to be constitutional, and the burden of proving that an act of the Legislature is unconstitutional is upon the party attacking the act. *Soloco, Inc. v. Dupree*, 97-1256, p.2 (La.1/21/98); 707 So.2d 12. The power of the Legislature is plenary, and a party challenging a statute's constitutionality must articulate a particular constitutional provision that limits the Legislature's powers. *Id.* In the case *sub judice*, plaintiffs have invoked the equal protection provision of the Louisiana Constitution and principles of substantive and procedural due process. We will address each of these arguments in turn.

Louisiana Constitution Article I, § 3 provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

Louisiana Constitution Article I, § 3 provides for three levels of constitutional review or scrutiny. Laws which classify individuals based on race or religious beliefs are repudiated completely. An intermediate level of scrutiny is reserved for laws which classify persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliation. The lowest level of scrutiny applies to laws which classify persons on any basis other than those enumerated in La. Const. Art. I, § 3. Such laws

need only be rationally related to a legitimate governmental purpose, and a person attacking the constitutionality of such a classification has the stringent burden of demonstrating that the law does not suitably further any appropriate state interest. *Id.*

Plaintiffs suggest that commercial fishermen constitute a culture and heritage, unique to Louisiana. Thus, they assert an intermediate level of scrutiny is appropriate under the facts of this case.

In reviewing the trial court's determination that § 305 B(14)(a) of Act 1316 was a violation of equal protection of the law under the Louisiana Constitution, the Louisiana Supreme Court explained:

> The first step in the analysis of this issue is to define the appropriate level of constitutional scrutiny. Given the economic nature of the gear licensing regulation at issue, we conclude that the rational basis standard applies. *See Moore v. RLCC Technologies, Inc.*, 95-2621 (La.2/28/96); 668 So.2d 1135, 1143 (noting that the "rational basis standard traditionally [is] applied to legislation involving economics and social welfare" and police power); *see also Lane v. Chiles*, 698 So.2d 260 (Fla.1997) (because fishing is not a fundamental right and commercial fishermen do not constitute a suspect class, the rational basis test applies); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370, 1382 (E.D.La.1978); *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (upholding a ban on pushcart vendors in the French Quarter, along with a grandfather provision, under the rational basis standard).

Louisiana Seafood Management Council, 97-1367 at p.14; 715 So.2d at 395.

Thus, we apply the rational basis standard in addressing plaintiffs' equal protection challenge.

Under the rational basis standard, great deference is given to legislative determinations. A classification is constitutional if it has some reasonable basis. A classification "does not offend the constitution simply because [it] is not made with mathematical nicety or because in practice it results in some inequality." *Id.*

In their equal protection challenge, plaintiffs maintain that the real purpose of Act 1316 is a "class-based discrimination in favor of recreational fishermen."

The express purpose of Section 2 of Act 1316, as articulated in § 13.1, is "to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal waters." It is well-settled that a state's police powers include safeguarding the wildlife and fisheries for the benefit of its people. La. Const. Art. IX, § 1; *see State v. McHugh*, 92-1852, p.9 (La.1/6/94); 630 So.2d 1259, 1264-65. Act 1316 was enacted pursuant to the state's police powers as a conservation measure. The expert evidence adduced at the trial on the permanent injunction, including those experts tendered by plaintiffs, established that Act 1316, which contains provisions restricting gear use, places where gill nets can be used and seasons, constitutes a conservation measure and moves the fisheries resources toward maximum protection of the various species.

Additionally, we note that La. R.S. 56:302.3 (as enacted pursuant to Act 1316) specifically prohibits use of gill nets, trammel nets, strike nets or seines by recreational fishermen. Thus, Act 1316 does not seek to single out particular kinds of fishermen; rather, the restrictions established by Act 1316 relate only to particular kinds of fishing equipment. *See Lane v. Chiles*, 698 So.2d 260, 264 (Fla.1997).

Based on this record, we conclude that the statutory provisions enacted pursuant to Act 1316 are rationally related to the Legislature's express purpose of promoting the enhancement of the state's marine resources and do not amount to an equal protection violation under La. Const. Art. I, § 3.[10]

We turn now to plaintiffs' substantive due process challenges to the statutory provisions enacted pursuant to Act 1316. Plaintiffs urge the enactment of Act 1316 constitutes an unreasonable use of the Legislature's police powers and, as such, is arbitrary, capricious and in

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[10] Plaintiffs specifically maintain that the weekend ban on commercial fishing amounts to unequal protection under the law. The record establishes that the restriction of commercial fishing on weekends assists in the effective enforcement of DWF regulations and, therefore, is rationally related to the express purpose of Act 1316 which is to promote the enhancement of Louisiana's marine resources.

Additionally, plaintiffs assert the trial court erred in failing to hold unconstitutional on equal protection grounds the requirement within the provisions of Act 1316 of showing an applicant a previous gill net licensure as a condition of licensure for trammel net and/or seine fishing. In light of the evidence plaintiffs presented on this issue, we find the amendment to La. R.S. 56:305.5B renders the issue moot.

violation of substantive due process under Art. I, § 2 of the Louisiana Constitution. They further contend that through the enactment of Act 1316, they have been deprived of property rights, personal property (i.e., gear and capital investments) and a fundamental liberty interest (i.e., the right to engage in a lawful occupation) without just compensation.

Louisiana Constitution Article I, § 2 provides, "No person shall be denied life, liberty, or property without due process of law." The substantive component of the federal Due Process Clause prohibits a governmental entity from enacting legislation which bears no relationship to the "public health, safety, morals, or general welfare," and thus is beyond the government's police power. *See Standard Materials, Inc. v. City of Slidell*, 96-0684, p.13 (La.App. 1st Cir. 9/23/97); 700 So.2d 975, 985. Article I, § 2 of the Louisiana Constitution has been recognized as the source of substantive due process protection under the Louisiana Constitution. *Standard Materials, Inc.*, 96-0684 at p.13; 700 So.2d at 985.

Plaintiffs' substantive due process challenge in the case presently before us involves a claim that the statutory provisions enacted pursuant to Act 1316 amount to action by state government which interferes with their property and liberty interests in an arbitrary and capricious manner. Plaintiffs must *first* establish the existence of a constitutionally protected property or liberty interest. *Id.* at p.14; 700 So.2d at 986. In the direct appeal of those portions of Act 1316 which were declared unconstitutional by the trial court, the Louisiana Supreme Court determined, in the context of plaintiffs' takings clause challenge, that plaintiffs lacked any property interest in

the fish they harvest. *Louisiana Seafood Management Council*, 97-1367 at p.8; 715 So.2d at 392. We are therefore duty-bound to hold that plaintiffs have failed to establish a protected property interest in the fish. Likewise, our Supreme Court's determinations that the restrictions of use of plaintiffs' gear and capital investments do not constitute a "taking," *Louisiana Seafood Management Council*, 97-1367 at pp. 8-9; 715 So.2d at 392-93, and that plaintiffs lack a property interest in the "right to fish," *Louisiana Seafood Management Council*, 97-1367 at pp. 9-13; 715 So.2d at 392-95, constrain this court to find that plaintiffs have failed to establish the "property interest" requirement of a substantive due process claim. Plaintiffs' contention that through the enactment of Act 1316 they have been deprived of the right to engage in a lawful occupation, however, is within the ambit of due process protection. *See LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370, 1377-79 (La.E.D.1978).

Even if a party establishes the "liberty interest" requirement, a violation of substantive due process still requires arbitrary and capricious conduct by the governing authority. Legislation offends substantive due process if the government action is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *See Standard Materials, Inc.*, 96-0684 at pp. 14-15; 700 So.2d at 985. In other words, government action comports with substantive due process if the action is rationally related to a legitimate government interest. *Id.* As we concluded in our consideration of plaintiffs' equal protection challenge, the restrictions on the use of gill nets are rationally related to the Legislature's stated purpose of promoting

the enhancement of the state's marine resources by the removal of indiscriminate entanglement nets from coastal waters. Accordingly, we hold that the statutory provisions enacted pursuant to Act 1316 are not in violation of plaintiffs' substantive due process rights under the Louisiana Constitution.[11]

Plaintiffs urge they were denied a reasonable opportunity to participate in the Commercial Fisherman's Economic Assistance Program in violation of their procedural due process rights.

The fundamental requirement of procedural due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner. *Hudson v. Dep't of Public Safety and Corrections,* Louisiana State Penitentiary, 96-0499, p.5 (La.App. 1st Cir. 11/8/96); 682 So.2d 1314, 1318, writ denied, 96-2942 (La.1/3197); 687 So.2d 408.

Pursuant to the terms of § 13.1 as enacted in Act 1316, an applicant seeking eligibility in the Program was required to submit an application no later than October 1, 1995. The record establishes that by actual notice from the

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[11] Plaintiffs rely on *City of Shreveport v. Curry,* 357 So.2d 1078, 1081 (La.1978), to assert that Act 1316 is an unreasonable use of the state's police power under La. Const. Art. I, § 2. Legislation does not cut constitutional muster if there is no real and substantial relationship between the regulation and the protection or promotion of the general welfare. *City of Shreveport,* 357 So.2d at 1082. Based on the evidence in this record and mindful of the express purpose of promotion of the state's marine resources, we conclude that a real and substantial relationship exists between the statutory provisions enacted pursuant to Act 1316 and the promotion of the general welfare.

legislative process or through affiliations with various commercial fishing associations, none of the plaintiffs who testified were without notice of the displacement of their gill net use and the opportunity available to each to apply for participation in the Program. On December 15, 1995, DWF sent written notices to all those applicants who had mailed in their applications by October 1, 1995, as well as to all saltwater gill net fishermen duly licensed in 1995, advising that they appear in person at a workshop on December 27, 1995, for an explanation and to execute contracts to purchase the nets. The letter delineated the financial information the applicant would have to present in order to qualify.

Based on this record, we conclude that plaintiffs have been given notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Accordingly, we find that the Commercial Fisherman's Economic Assistance Program does not deny plaintiffs their procedural due process rights.[12]

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[12] Plaintiffs' contention that the denial in Act 1316 of a commercial rod and reel license to those convicted of any fishery-related violation which constitutes a class three or greater violation amounts to double and excessive punishment under La. Const. Art. I, §§ 2 and 20 has been rendered moot by the Legislature's repeal, by Acts 1197, No. 727, § 2, of La. R.S. 56:305B(14)(c).

CONCLUSION

For the reasons set forth herein, we affirm the trial court's judgment determining that the statutory provisions enacted pursuant to Act 1316 are constitutional and denying plaintiffs permanent injunctive relief.[13]

AFFIRMED.

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[13] Plaintiffs assigned error to the trial court's determination that those portions of Act 1316 which it determined were unconstitutional were severable from the remainder of the act. Because our Supreme Court has reversed the trial court, and we have concluded the remainder of Act 1316 is constitutional, the issue of severablity is moot. Therefore, we do not address plaintiffs' contention relative to severability.

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, ET AL.	*	NO. 419,467 – DIVISION D
	*	19TH JUDICIAL DISTRICT COURT
VS.	*	PARISH OF EAST BATON ROUGE
LOUISIANA WILDLIFE AND FISHERIES COMMISSION, ET AL.	*	STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter came before the Court in the form of a Petition for Declaratory and Injunctive relief.

The issues to be resolved by this Court are the following:

(1) Whether Act 1316 violates the Takings Clause under the Federal and State Constitutions; and,

(2) Whether Act 1316 violates the Federal Commerce Clause.

TAKINGS CLAUSE ANALYSIS

The Fifth Amendment to our Federal Constitution provides, in part, that "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Louisiana Constitution mirrors and extends this Federal Constitutional right by guaranteeing just compensation for any property taken by the State for public purposes. La. Const. art. I, § 4, as amended.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). Once bestowed, property interests may not be extinguished by the state without adherence to minimal due process standards. *Boucvalt v. Board of Comm'rs*, 798 F.2d 722, 728 (5th Cir. 1986). But the legislature which creates a property interest may rescind it. *Atkins v. Parker*, 472 U.S. 115, 129, 105 S.Ct. 2520, 2529, 86 L.Ed.2d 81 (1985); *see also McMurtray v. Holladay*, 11 F.3d 499, 502 (5th Cir. 1993).

However, the Louisiana Constitution requires more than minimal due process. Once the legislature confers a property interest upon a certain class of people, it may not take away that right without just compensation. La. Const. art. I, § 4, as amended; *see State Through DOTD v. Chambers Inv. Co.*, 595 So.2d 598, 602 (La. 1992).

The class of commercial fishermen involved in this litigation maintains that former R.S. 56:640.3 conferred on them an incorporeal property right to fish commercially. They further assert that Act 1316 has rendered valueless this legislatively conferred incorporeal right by depriving them of their right to use their previously legal gear. This effect, they maintain, amounts to a taking without just compensation.

Counsel for defendants and intervenor have argued that Act 1316 is a gill net ban; however, they suggest that nowhere in the Act is the State taking the gill nets from the petitioners. Rather, Act 1316 merely restricts the use of gill nets while allowing the commercial fishermen to

retain dominion and control over their gill nets. The defendants and intervenor argue that the commercial fishermen can sell their nets, they can put them to other uses, they can even fish with them outside of Louisiana waters.[1] Additionally, defendants and intervenor argue that Act 1316 provides assistance to the commercial fishermen through the "Commercial Fisherman's Economic Assistance Fund" and the "Commercial Fisherman's Assistance Program". Through these programs, the State has offered assistance to the commercial fishermen economically harmed by Act 1316. The assistance offered is in the form of "buy back" provisions and training programs.[2] Defendants and intervenor insist that the State was not obligated to compensate the commercial fishermen for effectively rendering their gill nets useless in State waters because the State did not take their gill nets. Hence, the "buy back" and training provisions of the Act is part of the state largesse. This argument is persuasive, and would even be compelling if indeed our State was like the rest of the Union. However, the State of Louisiana, through its Legislature, conferred upon the commercial fishermen of this State the right to fish commercially in 1986. *See* La. R.S. 56:640.3 prior to its revision or amendment or outright constructive repeal by Act 1316.

With respect to this legislatively conferred incorporeal right, the next issue is whether Act 1316

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[1] *See Burns Harbor Fish Co. v. Ralston*, 800 F.Supp 722, 725 (S.D. Ind. 1992).

[2] Evidenced [sic] adduced at trial revealed that from the approximately 1100 commercial fishermen in 1995, 44 applied for assistance under the Act. Only 11 qualified.

extinguished this right; and, if so, whether this extinguishment constituted a taking for which the State owed just compensation.

In *State Through DOTD v. Chambers Inv. Co., supra id,* the Louisiana Supreme Court recognized the right to just compensation for the taking of an incorporeal right. The Court pointed out that "[t]he action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal." The Court then proceeded to enunciate a three-pronged test to determine whether a claimant is entitled to eminent domain compensation:

(1) Whether a person's legal right with respect to a thing or an object has been affected;

(2) If it is determined that property is involved, then the court must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power;

(3) Whether the taking is for a public purpose under Article I, § 4.

WHETHER THE INTEREST THAT THE COMMERCIAL FISHERMEN CONTEND WAS ADVERSELY AFFECTED CONSTITUTES PROPERTY WITHIN THE PURVIEW OF EMINENT DOMAIN LAW:

Former Louisiana Revised Statutes 56:640.3 established the right to fish commercially in this State. In creating that incorporeal right, the law qualified the right by conditioning the elimination of the use of the legal method of harvesting fish upon biological data showing damage to any species of fish affected by that particular method of fishing.

In this case, the petitioners who were licensed to fish commercially [and all others who were permitted to fish commercially] prior to the enactment of Act No. 1316, § 2 which amended this statute, had the vested right to fish commercially. Having been invested with that right, the commercial fishermen then proceeded to purchase the necessary legal gear and boat(s) to exercise that right. Several of these commercial fishermen invested thousands of dollars with the understanding, as expressed in the law, that their gear would not be later declared illegal without biological data showing that a previously legal method of harvesting fish was damaging a particular species of fish.

Act 1316 eliminated the use of gill nets in state waters. This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that the gill nets were damaging a particular species of fish. Consequently, the petitioners who are commercial fishermen and who had invested in gill nets had their right to fish commercially affected.

HAS THE RIGHT TO FISH COMMERCIALLY BEEN TAKEN OR DAMAGED IN A CONSTITUTIONAL SENSE:

When Act 1316 rendered illegal the use of gill nets, several of the commercial fishermen lost most, if not all, of their business. No longer were they able to meet the demands for the fish they had been catching. To offset their losses, the State, through Act 1316, offered to buy back some of their gear and/or extend educational opportunities to these commercial fishermen with the precondition that they would surrender their right to fish commercially.

The "buy back" and training provisions of the Act are woefully inadequate and fail to justly compensate the commercial fishermen. For instance, in arbitrarily restricting the eligibility of those applicants for economic assistance to those who had purchased a gill net license in at least two of the years between 1993 and 1995, Act 1316 provides no compensation to all those who had been conferred the incorporeal right to fish commercially and who had been permitted to fish commercialiy since 1986, but who did not purchase a gill net license in two of the years between 1993 and 1995. § 13.1B(1) of Act 1316; see note 2 of this Court's "Reasons for Judgment". Additionally, the "buy back" and training provisions fail to justly compensate those who qualified for economic assistance under the Act because the Department of Wildlife and Fisheries has failed to allocate any money for the purchase of the formerly legal gear. Hence, by failing to justly compensate the commercial fishermen, the State,

through Act 1316, has taken property without just compensation. The Court, therefore, finds that § 13.1 of Act 1316 violates Article I, § 4 of the *Louisiana Constitution*.

IS THE TAKING FOR A PUBLIC PURPOSE UNDER ARTICLE I, § 4:

The stated purpose for the reduced usage and eventual total prohibition of the formerly legal gear is "to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal waters." La. R.S. 56:13.1. Hence, the Act expressly provides that the gill net ban is for a public purpose.

Having shown that (a) their incorporeal right to fish commercially has been affected, (b) that this taking has been in a constitutional sense, and (c) that the taking has been for a public purpose, the commercial fishermen have met the *Chambers* three-pronged test and are, thus, entitled to eminent domain compensation.

COMMERCE CLAUSE ANALYSIS

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. Art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems v. Dept. of Env. Quality*, ___ U.S. ___, 114 S.Ct. 1345, 1349 (1994).

The standard to be applied to determine whether a nondiscriminatory state statute violates the Federal Commerce Clause was enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 847 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

However, the States cannot exact more than a just share from interstate commerce. *Oregon Waste Systems, supra,* ___ U.S. ___, 114 S.Ct. at 1351.

Section 305 (B) (4) (b) of Act 1316 imposes a fee of "Two hundred fifty dollars per gill net that may only be used in the federal exclusive economic zone (EEZ) as defined in 50 Code of Regulations § 620." Further, by Section 305.5 (B) of Act 1316, the Secretary of the Department of Wildlife and Fisheries is mandated to charge an additional fee of two hundred fifty dollars "for issuance of permits to persons authorized to possess gill nets, trammel nets, strike nets, and seines within the territorial boundaries of the state while traversing state waters to and from the federal exclusive economic zone."

The defendants and intervenor maintain that the chief benefit of the $250.00 gill net licenses and the $250.00 traversal fee is in enforcement. They contend that

the funds generated will aid in the administrative and enforcement activities conducted by the Department.

Petitioners demonstrated with clear and convincing evidence, including uncontradicted testimony, that these assessments do not relate to any increase in administrative costs. Additionally, petitioners proved by similar clear and convincing evidence that these fees do not contribute in any way to the professed aim of the Act. For these reasons this Court finds through these fees the State is exacting more than its just share from interstate commerce. And, thus, this Court concludes that Section 305 (B) (4) (b) and Section 305.5 (B) of Act 1316 violate the Federal Commerce Clause.

WHETHER SECTIONS 13.1, 305 (B) (4) (b) AND 305.5 (B) OF ACT 1316 ARE SEVERABLE:

In *Louisiana Associated General Contractors, Inc. v. State*, 95-2105 (La. 3/8/96), 669 So.2d 1185, the Court enunciated the test for severability: –

> The unconstitutionality of one or more portions of a law does not render the entire law unenforceable if the remaining portions are severable from the offending portions. *Police Association of New Orleans v. City of New Orleans*, 94-1078 at p. 19-21; 649 So.2d 951, 965 (La. 1/17/95). The test for severability is whether the unconstitutional portions of the law are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention of the legislative body enacting the law. *Police Association, Id; Polk v. Edwards*, 626 So.2d 1128, 1148 (La. 1993). To be capable of separate enforcement, the valid portion of an

> enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether the legislature would have passed the statute had it been presented with the invalid features removed. *Succession of Lauga*, 624 So.2d 1156, 1171-72 (La. 1993). Where the purpose of the statute is defeated by the invalidity of part of the act, the entire act is void. Conversely, however, when the general objectives of the act can be achieved without the invalid part, the remaining parts of the act will be upheld. *Polk, Id.; Lauga, Id.*

This Court has previously observed that the State is obligated under our State Constitution to preserve its natural resources. And, correspondingly, the State does not have to wait until a natural resource is depleted or in jeopardy before it acts to meet that constitutional mandate. The stated purpose of the Act is to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal waters. § 13.1 (A) of Act 1316. Additionally, counsel for the intervenor has argued that the purpose of Act 1316 is to ban gill nets. The ban of the use of gill nets in State waters is, thus, a legitimate attempt by the State to meet the [sic] its constitutional mandate to preserve its natural resources.

At the same time, however, because the State itself had conferred upon commercial fishermen the incorporeal right to fish commercially and the interrelated right to use certain gear under former La. R.S. 56:640.3, Article I, § 4 of the Louisiana Constitution prohibits the

State from taking away that incorporeal right without just compensation. Hence, the State is obligated to justly compensate those commercial fishermen who had purchased legal gear in the exercise of that previously legislatively conferred right to fish commercially.

Unfortunately, as discussed above, § 13.1 of Act 1316 fails to justly compensate commercial fishermen for the diminished value of their gill nets and equipment purchased in connection with their right to fish commercially. As such, § 13.1 violates our State Constitution. The rest of the Act, however, is severable because "the general objectives of the Act can be achieved without the invalid part." For the same reasons, this Court is of the opinion that the rest of the Act can be severed from §§ 305 (B) (4) (b) and 305.5 (B).

For the aforementioned reasons, this Court permanently enjoins the Department from enforcing §§ 13.1, 305 (B) (4) (b) and 305.5 (B) of Act 1316. Additionally, the defendant State of Louisiana is **ORDERED** to justly compensate the commercial fishermen who were either licensed or permitted to fish commercially when Act 1316 went into effect. The State shall justly compensate these fishermen for all previously legal gear and equipment they had purchased in the exercise of their previously legislatively conferred incorporeal right to fish commercially. Judgment is to be signed accordingly.

READ AND SIGNED in Baton Rouge, Louisiana, this 22nd day of May, 1996.

/s/ Janice Clark
JUDGE, 19TH JUDICIAL
DISTRICT COURT
(Filed MAY 22, 1996)

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, et al.,

VERSUS

LOUISIANA WILDLIFE AND FISHERIES COMMISSION; LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES.

DOCKET NO. 419467
SEC. 13

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JUDGMENT

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This matter was heard before this Court on plaintiffs' application for a permanent injunction of Act 1316 of the 1995 Regular Session of the Louisiana Legislature. Testimony and argument were heard on February 27 and 28, 1996. Written Reasons for Judgment were issued on May 22, 1996 permanently enjoining part of Act 1316.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Section 13.1 of Act 1316 is hereby permanently enjoined as it violates Article I, Sec. 4 of the Louisiana Constitution.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Sections 305(B)(4)(b) and 305.5(B) of Act 1316 are hereby permanently enjoined as they violate the federal Commerce Clause of the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant State of Louisiana is to justly compensate the commercial fishermen who were either licensed or permitted to fish commercially when Act 1316 went into effect for all previously legal gear and equipment they had purchased in the exercise of their previously legislatively conferred incorporeal to fish commercially.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE, THIS 19th **DAY OF** June, **1996.**

/s/ Janice Clark
JUDGE

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, INC., et al.	*	NO. 419,467 – DIVISION D
	*	19TH JUDICIAL DISTRICT COURT
VS.	*	PARISH OF EAST BATON ROUGE
LOUISIANA WILDLIFE & FISHERIES COMMISSION, et al.	*	STATE OF LOUISIANA

REASONS FOR JUDGMENT

(Filed Jan. 09, 1997)

This matter came before the Court in the form of a Motion for Partial New Trial filed on behalf of the plaintiffs. Whereupon, the Court took the matter under advisement.

In its previous pronouncement regarding the constitutionality of Act 1316, this Court addressed two specific issues: (1) the "Takings Clause" claim under both the federal and Louisiana constitutions and (2) the "Commerce Clause" challenge to the "Traversal and Per Net Fee for Fishing in the EEZ"[1]. The Court chose not to address the other claims because in effect on May 22, 1996, was an injunction issued by Judge Porteous of the Eastern District of Louisiana enjoining the enforcement of several provisions of the Act, including the Sections

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[1] Prior to the trial on the permanent injunction, the Court had informed all counsel that the main issues of concern for the Court were the "Takings Clause" and "Commerce Clause" claims. The Court allowed the parties to introduce evidence with respect to any provision of the Act. But, the Court limited its ruling to the "Takings Clause" and "Commerce Clause" claims.

which addressed commercial rod & reel licensing[2] and those which addressed weekend commercial fishing[3]. When it limited its ruling to the "Takings Clause" and "Commerce Clause" claims, this Court did not bless by its silence the remaining provisions of the Act. The Court respectfully allowed the federal suit to run its course before proceeding to address the remaining issues. Because the preliminary injunction issued by federal court has been dissolved, it is now appropriate for the Court to address the remaining claims.

Under § 305(B)(14)(a) of Act 1316, to be eligible for a commercial rod & reel license, an applicant must have acquired a gill net license in two of the past three years. Prior to the enactment of Act 1316, there was no such requirement on rod & reel fishermen.

Upon a review of the evidence, this Court is of the opinion that the "Commercial Rod & Reel Fishermen" licensing requirement provision or § 305(B)(14)(a) lacks any rational basis. Absolutely no evidence was introduced by the defendants and intervenor which justified the new classification of commercial fishermen. Hence, this Court concludes as the federal court did, that, "[E]xclusion of past rod and reel fishermen simply because they did not possess a gill net license strikes this Court as either a mistake in the statute or a completely arbitrary classification." *Louisiana Seafood Mngt. Council, Inc., et al. v. Foster*, 917 F. Supp. 439, 446 (E.D. La. 1996).

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[2] § 305(B)(14)(a).

[3] §§ 325.3(C)(1), 325.4(A), and 333(B)(1).

Therefore, § 305(B)(14)(a) is unconstitutional and unenforceable under both the Federal and Louisiana Constitutions.

The next issue is whether the "Weekend Commercial Fishing" sections[4] of Act 1316 violate the Equal Protection Clause of both the State and Federal constitutions and/or violate the Commerce Clause of the Federal constitution.

In *State ex rel. Guste v. K-Mart Corporation*, 462 So.2d 616, 618-619 (La. 1985), the supreme court articulated the test to be applied in constitutional equal protection challenges to the exercise of the state's police powers:

> The Fourteenth Amendment gives substantial latitude to the individual states in promulgating laws through their police power. State laws may be constitutional even if they create classifications of the affected constituency and result in uneven treatment to the different statutory classes. The legislature's wisdom in enacting such discriminatory laws will not be overriden [sic] if 'any set of facts reasonably may be conceived to justify the laws.'
>
> Such justification is usually determined by an analysis of the law's purpose and of the means by which the purpose is carried out. If the purpose or effect of the statute is to discriminate against so-called suspect classifications, such as race or alenage, [sic] or involves a constitutionally protected area such as freedom of

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[4] §§ 325.3(C)(1), 325.4(A), and 333(B)(1) prohibit commercial fishing for speckled trout, other saltwater finfish, and mullet during the period from 5:00 a.m. on Saturday through 6:00 p.m. on Sunday. *See Louisiana Seafood Mngt. Council, et al. v. Foster*, 917 F. Supp. 439, 444-445 (E.D. La. 1996).

> expression, the laws will be strictly scrutinized. If such suspect classifications are not involved, then the statutory means need only be rationally related to a legitimate statutory end.

The regulation of the fishing industry is within the scope of the state's police power both to preserve the state's natural resources and as a matter of public health and safety. *State v. Greco* 583 So.2d 825, 829 (La. 1991). The "Weekend Commercial Fishing" classifications sections do not discriminate against so-called suspect classifications nor involve a constitutionally protected area such as freedom of expression or other fundamental rights. Therefore, the challenged statutory means need only be rationally related to a legitimate statutory end.

"States are accorded wide latitude in the regulation of their local economies under the police powers and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516. "A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation or empirical data." *FCC v. Beach Communications, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 2096, 2102 (1993). To prevail under the equal protection claim, therefore, the commercial fishermen would be required to show that the "Weekend Commercial Fishing" sections of Act 1316 are clearly arbitrary and unreasonable, with no rational relation to a legitimate state interest. *See New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1309 (2nd Cir. 1994).

The stated purpose of Act 1316 is to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal

waters. § 13.1 (A) of Act 1316. The Supreme Court in *Maine v. Taylor*, 477 U.S. 131, 140, 106 S. Ct. 2440, 2448 (1986), held that "[T]he protection of the environment and conservation of natural resources – including marine resources – are areas of 'legitimate local concern.' " Hence, the State of Louisiana having stated a legitimate local concern, this Court will not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. *State Ex Rel. Guste v. K-Mart Corp.*, 462 So.2d at 619, quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S. Ct. 461, 464-465 (1955). For these reasons, the Court finds that the "Weekend Commercial Fishing" sections of Act 1316 do not violate the Equal Protection clause of both the Federal and State Constitutions.

The next issue is whether the "Weekend Commercial Fishing" sections of Act 1316 violate the Commerce Clause of the United States Constitution.

The "Weekend Commercial Fishing" sections do not facially discriminate against out-of-state residents. Hence, under the standard enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970), these sections which only incidentally burden interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

The petitioners have proven that these sections have an incidental burden on interstate commerce because commerce is being deprived of finfish, and byproducts, which would be captured and transported in interstate

commerce. *See also, Louisiana Seafood Mngt. Council, et al. v. Foster,* 917 F. Supp at 445. The question then becomes whether the burden on interstate commerce is clearly excessive to the putative local benefits.

As stated above, the stated purpose of Act 1316 is to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal waters. § 13.1 (A) of Act 1316. This is a legitimate local concern. *See Maine v. Taylor,* 477 U.S. at 140, 106 S. Ct. at 2448. The State of Louisiana has not needlessly obstructed interstate trade or attempted to place itself in a position of economic isolation. Hence, "it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. *Id.* at 2454. On the other hand, the petitioners did not introduce sufficient evidence to show any excessive burden on interstate commerce as a result of any prohibition on weekend fishing. For these reasons, the Court is of the opinion that the Commerce Clause challenge to the "Weekend Commercial Fishing" sections of Act 1316 lacks merit.

CONCLUSION

This Court has previously held as unconstitutional §§ 13.1, 305(B)(4)(b) and 305.5(B) of Act 1316. This holding has not been changed; and, hence, those sections remain permanently enjoined.

The Court also permanently enjoins § 305(B)(14)(a) (the "Commercial Rod & Reel Fishermen" licensing requirement). In all other respects, Act 1316 is constitutional. Judgment is to be signed accordingly.

READ AND SIGNED in Baton Rouge, Louisiana, this 9th day of January, 1997.

/s/ Janice Clark
JUDGE, 19TH JUDICIAL DISTRICT COURT

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, et al.	*	NO. 419,467 – DIVISION D
	*	19TH JUDICIAL DISTRICT COURT
VS.	*	
	*	PARISH OF EAST BATON ROUGE
LOUISIANA WILDLIFE AND FISHERIES COMMISSION; LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES	*	STATE OF LOUISIANA
	*	
	*	
	*	
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JUDGMENT

(Filed FEB. 18, 1997)

This matter came before this Court on plaintiffs' Motion for Partial New Trial. Argument was heard on October 7, 1996. Written Reasons for Judgment were issued on January 9, 1997, permanently enjoining sections 13.1, 305(B)(4)(b), 305(B)(14)(a), and 305.5(B) of Act 1316 of the 1995 Regular Session of the Louisiana Legislature and declaring that in all other respects Act 1316 is constitutional.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Section 305(B)(14)(a) of Act 1316 is hereby permanently enjoined as it is unconstitutional under both the Federal and Louisiana Constitutions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to Judgment of this Court dated June 19, 1996, Sections 305(B)(4)(b) and 305.5(B) of Act 1316 are permanently enjoined as they violate the federal Commerce Clause of the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to Judgment of this Court dated June 19, 1996, defendant State of Louisiana is to justly compensate the commercial fishermen who were either licensed or permitted to fish commercially when Act 1316 went into effect for all previously legal gear and equipment they had purchased in the exercise of their previously legislatively conferred incorporeal right to fish commercially.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in all other 40 respects, Act 1316 is constitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the commercial fishermen who were either licensed or permitted to fish commercially when Act 1316 went into effect be certified as a class.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 18th day of February, 1997.

/s/ Janice Clark
JUDGE, 19TH JUDICIAL DISTRICT COURT

97-1367 (La. 5/19/98)

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, et al.

v.

LOUISIANA WILDLIFE AND FISHERIES COMMISSION, et al.

No. 97-CA-1367.

Supreme Court of Louisiana.

May 19, 1998.

Edmond Wade Shows, Richard Phillip Ieyoub, Attorney General, Frederick Whitrock, T. Michael Landrum, Ronnie J. Berthelot, Donald Edwin Puckett, Thomas E. Balhoff, Judith R.E. Atkinson, Baton Rouge, for Applicant.

Robert Alan Barnett, New Orleans, Paul R. Baier, Baton Rouge, for Respondent.

LEMMON, Justice.*

This is a direct appeal from a judgment of the trial court that declared unconstitutional several portions of Act No. 1316 of 1995, entitled the Louisiana Marine Resources Conservation Act and colloquially called the "gill net ban" law.[1]

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* Kimball, J., not on panel, recused. Rule IV, Part II, § 3.

[1] La. Acts 1995, No. 1316, amended and reenacted significant sections of Title 56 of the Revised Statutes.

Facts

Act 1316 of 1995 significantly restricted the use of gill nets by commercial fishermen in Louisiana waters. The principal limitations were on the manner in which gill nets can be used. The Act restricts a commercial fisherman to the use of one "strike net"[2] and, after a two-year phase-in period, to the taking of mullets and pompano. And even for those species, the periods of time during which fish can be taken were significantly limited.

Attempting to block the implementation of Act 1316, plaintiffs[3] filed the instant class action against the Louisiana Wildlife and Fisheries Commission and the Department of Wildlife and Fisheries (DWF).[4] Plaintiffs asserted that Act 1316 is unconstitutional in its entirety based on numerous violations of state and federal constitutional provisions.

After a hearing, the trial court denied plaintiffs' request for a preliminary injunction, finding generally

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[2] A strike net is a gill net which is not attached to the bottom and which is actively fished.

[3] The plaintiffs are licensed commercial saltwater fishermen, associations composed of commercial fishermen, commercial seafood marketing interests, seafood wholesalers, seafood retailers, restaurateurs who sell seafood, and seafood consumers.

[4] The Coastal Conservation Association, d/b/a Gulf Coast Conservation Association of Louisiana (GCCA), permissively intervened.

that the provisions of Act 1316 were constitutional. However, the court reserved judgment on the alleged commerce clause and takings clause violations until the trial of the permanent injunction.[5]

The trial court thereafter conducted a merits hearing on the permanent injunction. In reasons for judgment, the court concluded that the statutory provisions at issue violated both the takings clause and the commerce clause.[6] As to the takings clause, the court ruled that former La.Rev.Stat. 56:640.3 conferred on plaintiffs an incorporeal property right to fish commercially[7] and that

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[5] Particularly, the court reserved decisions on (1) whether the significant restrictions on the use of gill nets and the gill net buy-back program violate the takings clause of both the federal and state constitutions, and (2) whether Act 1316's provisions regarding the traversal and per net fee for fishing in the federal exclusive economic zone ("EEZ"), La.Rev.Stat. 56:305B(4)(b) and 305.5B, as amended by Act 1316, violate the federal commerce clause.

[6] The parties virtually concede that the Legislature's 1997 repeal of La.Rev.Stat. 56:305B(4)(b) and amendment of La.Rev.Stat. 56:305.5B renders the commerce clause issue moot. We therefore do not address this issue.

[7] Prior to Act 1316 of 1995, La.Rev.Stat. 56:640.3 provided:

> A. The legislature recognizes that legal methods to harvest any species of fish should not create a severe economic and personal hardship on the fishermen using said method. The legislature thereby declares that restrictions on legal methods to harvest finfish, shrimp, oysters, crabs, or any other species of fish should be recommended by the Louisiana Department of Wildlife and Fisheries.
>
> B. The department shall recommend the elimination of a presently legal method to harvest fish

the 1995 amendment to that statute constituted an "outright constructive repeal" of the right to fish commercially.[8] Having found plaintiffs possessed an incorporeal

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only if any species of fish affected by that harvesting method will be damaged without the elimination of that method. The department shall base its recommendation on biological data which may be obtained by any method and from any source the department deems appropriate.

C. Upon introduction of any instrument which eliminates a legal method to harvest fish commercially, the House or Senate Committee on Natural Resources should request a recommendation from the department. The department shall present a recommendation to the committee based on its findings from the biological data no later than the opening of the next regular session of the legislature.

[8] As amended by Act 1316, La.Rev.Stat. 56:640.3 presently provides:

A. The legislature recognizes that under the public trust doctrine the marine fishing resources, among other natural resources, are managed by the state in trust for the benefit of all its citizens.

B. The legislature also recognizes that all citizens of the state have a right to fish in and otherwise enjoy marine waters as long as they are in compliance with current licensing requirements. Furthermore, conservation and management decisions shall be fair and equitable to all the people of the state and implemented in such a manner that no individual, corporation, or other entity acquires an excessive share of such rights and privileges. The right to fish does not convey any property right or ownership in the fishery resource, but rather recognizes continued public access to fishing opportunities in marine waters.

right that was extinguished by Act 1316, the trial court turned to the question of whether that extinguishment was a constitutional taking.

The trial court applied the three-pronged test enunciated in *State Through Dep't of Transp. and Dev. v. Chambers Inv. Co.*, 595 So.2d 598 (La.1992) for determining whether compensation is due for the taking of an incorporeal right.[9] Addressing whether Act 1316 affected the plaintiffs' right to fish commercially, the court observed:

> C. The legislature further recognizes that the state's marine fishery resources require proper management in order to be sustained biologically and to continually produce a maximum yield of social and economic benefits. To this end, restrictions on legal fishing methods to harvest finfish, shrimp, oysters, crabs, and other marine fish species may become necessary.
>
> D. The department shall recommend the elimination or restriction of any fishing gear currently in use or which may be used in recreational or commercial fisheries in implementing its management responsibilities or in response to any emergency situation. While elimination or restriction may have uneven impacts on different groups of fishermen, the proposed measures should be applicable to all people of the state. In addition to acquiring the best available biological data, the department shall use all practicable means to collect all relevant social and economic data in support of such allocation decisionmaking efforts.

[9] Noting the need for a "firm framework" of analysis for dealing with the taking of legal property rights as opposed to tangible concrete objects, this court enunciated the following three-pronged test for doing so in *Chambers*:

> Under this analysis, we must first determine if a person's legal right with respect to a thing or an

In this case, the petitioners who were licensed to fish commercially [and all others who were permitted to fish commercially] prior to the enactment of Act. No. 1316, § 2 which amended this statute, had the vested right, to fish commercially. Having been invested with that right, the commercial fishermen then proceeded to purchase the necessary legal gear and boat(s) to exercise that right. Several of these commercial fishermen invested thousands of dollars with the understanding, as expressed in the law, that their gear would not be later declared illegal without biological data showing that a previously legal method of harvesting fish was damaging a particular species of fish.

Act 1316 eliminated the use of gill nets in state waters. *This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that the gill nets were damaging a particular species of fish.* Consequently, the petitioners who are commercial fishermen and who had invested in gill nets had their right to fish commercially affected. (emphasis added).

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object has been affected. . . . Second, if it is determined that *property* is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under Article I, § 4. (emphasis in original).

595 So.2d at 603.

Turning to the second inquiry of whether the property right has been taken or damaged in a constitutional sense, the trial court commented that the result of Act 1316's rendering illegal the use of gill nets was that "several of the commercial fishermen lost most, if not all, of their business." Continuing, the court noted that "[t]o offset their losses, the State, through Act 1316, offered to buy back some of their gear and/or extend educational opportunities to these commercial fishermen with the precondition that they would surrender their right to fish commercially." Given this, the court concluded that the property right to fish commercially had been taken or damaged in a constitutional sense.

On the final inquiry of whether the taking was for a public purpose under La. Const. art. I, § 4, the trial court, citing the express legislative language that the purpose of Act 1316 was "to promote the enhancement of Louisiana's marine resources by the removal of indiscriminate entanglement nets from coastal waters," concluded that this clearly was a public purpose.

Since the three-prong *Chambers* test was satisfied, the trial court then examined Section 13.1 of Act 1316, which provides for buy-back of gill nets and for training of certain qualified applicants, to determine whether these programs constituted just compensation to the commercial fishermen. Labeling Section 13.1's provisions "woefully inadequate," the court reasoned:

> The "buy back" and training provisions of the Act are woefully inadequate and fail to justly compensate the commercial fishermen. For instance, in arbitrarily restricting the eligibility of those applicants for economic assistance to

> those who had purchased a gill net license in at least two of the years between 1993 and 1995, Act 1316 provides no compensation to all those who had been conferred the incorporeal right to fish commercially and who had been permitted to fish commercially since 1986, but who did not purchase a gill net license in two of the years between 1993 and 1995. Additionally, the "buy back" and training provisions fail to justly compensate those who qualified for economic assistance under the Act because the Department of Wildlife and Fisheries has failed to allocate any money for the purchase of the formerly legal gear.

The trial court thus concluded that Section 13.1 violated La. Const. art. I, § 4's prohibition against taking property without just compensation. Further concluding that Section 13.1 is severable from the remainder of Act 1316, the court permanently enjoined the Department from enforcing Section 13.1 and ordered the defendant State of Louisiana to "justly compensate the commercial fishermen who were either licensed or permitted to fish commercially when Act 1316 went into effect . . . for all previously legal gear and equipment they had purchased in the exercise of their previously legislatively conferred incorporeal right to fish commercially."

Plaintiffs thereafter applied for a new trial. In granting the motion in part, the trial court expressly noted that it had not addressed several sections of Act 1316, the enforcement of which a federal district judge had already enjoined. Inasmuch as the federal court had dissolved its injunction after the ruling on the permanent injunction in this case, the trial court found it appropriate to address

plaintiffs' claims regarding these other provisions of the Act.

Although rejecting on the merits plaintiffs' attacks on other provisions of the Act, the trial court found the commercial rod and reel licensing provision of Section 305B(14)(a) unconstitutional. In so doing, the court reasoned:

> Under § 305(B)(14)(a) of Act 1316, to be eligible for a commercial rod & reel license, an applicant must have acquired a gill net license in two of the past three years. Prior to the enactment of Act 1316, there was no such requirement on rod & reel fishermen.
>
> Upon a review of the evidence, this Court is of the opinion that the "Commercial Rod & Reel Fishermen" licensing requirement provision of § 305(B)(14)(a) lacks any rational basis. Absolutely no evidence was introduced by the defendants and intervenor which justified the new classification of commercial fishermen. Hence, this Court concludes as the federal court did, that "[E]xclusion of past rod and reel fishermen simply because they did not possess a gill net license strikes this Court as either a mistake in the statute or a completely arbitrary classification." *Louisiana Seafood Management Council, Inc. v. Foster,* 917 F.Supp. 439, 446 (E.D.La.1996).

Also reaffirming its prior holding, the trial court added Section 305B(14)(a) to the list of sections permanently enjoined.

From the trial court's decision, both sides appealed. Plaintiffs' appeal, contending that Act 1316 is unconstitutional in its entirety, is presently pending in the court of

appeal. Defendants' appeal contesting the district court's declaration of unconstitutionality of certain sections of the Act, falls within the ambit of this court's appellate jurisdiction.[10] La. Const. art. V, § 5(D).

Takings Clause

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Louisiana Constitution likewise provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.

La. Const. art. I, § 4.

An analysis of the takings clause issue requires an inquiry into the nature of the property interest alleged to have been taken. In the particular context of the gill net restrictions, fishermen in several states have unsuccessfully advanced three theories: (1) that they have a property right in the fish; (2) that their gear or other capital investment has been "taken;" or (3) that they have

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[10] The parties filed two motions seeking to consolidate this case with the appeal currently pending in the court of appeal. The first motion was denied. The second motion, filed after oral arguments, was referred to the merits and is hereby denied.

a property right in the "right to fish." Christopher L. Koch, *A Constitutional Analysis of Limited Entry*, in *Limited Entry as a Fishery Management Tool* 251, 265 (1978) (noting that "[n]one of these theories would seem to have a significant chance of success.")

The lack of any property interest in the fish in the waters is well-settled, statutorily and judicially. *See* La. Civ.Code arts. 450, 452; La.Rev.Stat. 56:3. In *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370 (E.D.La.1978), the court explained that "fish which are at large in state waters are the property of the state, as public or common things;" that "an individual has no proprietary interest in the fish he is prevented from catching;" and that "an individual has no proprietary right to fish commercially in state waters." 444 F.Supp. at 1378. Fishermen's inability to establish a private property interest in free-swimming corporeal fish has precluded recovery under this theory. Douglas F. Britton, *The Privatization of the American Fishery: Limitations, Recognitions, and the Public Trust*, 3 Ocean & Coastal L.J. 217, 236 (1997) (noting that under these circumstances fishermen have been regarded as "possessing no-compensable, or prosecutable, property interests" for takings claims purposes).

As to the taking of capital investment, both sides agree that Act 1316 has not deprived plaintiffs of their gear or other capital investments, but has restricted them from the most profitable use of their gill nets. However, "[g]overnmental regulation – by definition – involves the adjustment of private rights for public benefit. To require compensation whenever the law curtailed the potential for economic exploitation 'would effectively compel the government to regulate by *purchase*.' " Laurence H. Tribe,

American Constitutional Law 596-97 (2d ed.1988) (quoting *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979) (emphasis in original)). As a result, economic restraints generally do not rise to the level of a taking because, in the oft-quoted words of former Justice Holmes, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

A licensed commercial fisherman generally has no proprietary right in exercising his fishing license, but merely has a state-granted privilege subject to such limitations as the state may impose in the exercise of its police power. *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370, 1382 (E.D.La.1978). Further, while a licensed commercial fishermen has a proprietary interest in the use of his boats and nets, that interest is subject to restriction by the state pursuant to its power to regulate the taking of fish in public waters. *Id.* Indeed, the takings clause of the state constitution expressly provides that the state has the right in the exercise of its police powers to impose reasonable regulations on private property. La. Const. art. I, § 4.

Plaintiffs argue that the Act diminished the economic value of their equipment, but a similar argument was rejected in *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326-27, 62 L.Ed.2d 210 (1979). The court stated that "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a taking claim. . . . [T]he interest in anticipated gains has traditionally been viewed as less compelling than

other property-related interests." 444 U.S. at 66, 100 S.Ct. at 327.

Other courts have rejected the argument that a regulatory taking results from the banning or restricting the use of gill nets. In *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 289 So.2d 150 (La.1974), this court rejected the argument that restrictions on the use of gill nets made fishermen's investments in their boats and nets useless and amounted to a loss of a property right, reasoning that "[i]t may be that the boat may not be used with gill nets in the designated waters; however, the statute does not prohibit the use of the boat in these waters for fishing without gill nets, or, for that matter, with gill nets in nearby or adjoining waters." 289 So.2d at 153.

In *Lane v. Chiles*, 698 So.2d 260 (Fla.1997), the court recently rejected a similar takings clause challenge to Florida's amendment banning gill nets, reasoning:

> "[T]he amendment does not prohibit all possible uses for the property and equipment in question. State statutes that limit fishing seasons, restrict permitted gear, and define certain zones for particular activities have been upheld. . . . [R]estrictions on the harvest of marine fish does not constitute a taking of property from particular individuals."

698 So.2d at 264. *See also Burns Harbor Fish Co. v. Ralston*, 800 F.Supp. 722 (S.D.Ind.1992), in which the court reasoned:

> [T]he state merely forbids Burns Harbor from using gill nets within the confines of Indiana waters of Lake Michigan. All indications are

> that Burns Harbor still has dominion and control over its gill nets. Burns Harbor can sell its nets, it can put them to other uses, it can fish with them outside of Indiana waters. Indeed, it can do virtually anything it wants with its nets except use them to fish in Indiana waters. While the ban on gill net fishing prevents Burns Harbor from obtaining economic benefit from its nets when fishing in Indiana waters, the State's regulation cannot be considered a taking of the gill nets because the State of Indiana by regulating gill net fishing is simply exercising its sovereign right and responsibility to oversee and regulate the environment and wildlife within the State.

800 F.Supp. at 726.

Plaintiffs distinguish this case from the above line of cases. Pointing to the Legislature's enactment in 1986 of a commercial "right to fish" law, plaintiffs forcefully argue that they have a justifiable investment-backed reliance interest in the right to fish.[11]

As plaintiffs acknowledge, the issue at the crux of this case is whether commercial fishermen were vested in 1986 with an incorporeal right to fish with currently legal methods unless biological data supports an alteration of that right.

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[11] Indeed, the trial court differentiated this state from the "rest of the Union" because "the State of Louisiana, through its Legislature, conferred upon the commercial fishermen of this State the right to fish commercially in 1986" in La.Rev.Stat. 56:640.3 prior to its "revision or amendment or outright constructive repeal by Act 1316."

Defendants contend that the 1986 act was permissive legislation which simply set forth a policy statement suggesting that the Legislature "should" seek a recommendation from the Department when contemplating the alteration of any legal method of fishing commercially. Noting that the original draft of the statute mandated the Legislature to seek such a recommendation, but that the bill was reworded during the legislative process to provide that the Legislature "should" do so, defendants argue that this rewording made the legislation directory rather than mandatory.

In counter arguments, plaintiffs first contend that the title of the 1986 act indicated an intent "to limit legislative action"; "to require biological data furnished by the Department of Wildlife and Fisheries prior to action on legislation" and "to protect fisheries operations." Plaintiffs thus contend that the statute must be construed as mandatory to avoid a violation of title-object requirement of La. Const. art. III, § 15(A), which provides that "[e]very bill shall contain a brief title indicative of its object." We disagree.

This court has consistently construed the title-object requirement broadly as serving the purpose of giving "fair notice" to the Legislature and the public of the scope of legislation and thereby preventing the deceptive practice of misleading the Legislature into passing provisions not indicated by the title of the bill. *Orleans Parish School Board v. City of New Orleans,* 410 So.2d 1038 (La.1982). Courts through the years have held a statute void only when the variance in the provisions of the act is palpable and totally irreconcilable with its title, or when both title and body express two distinct subjects. Gordon Kean, *The*

Title-Body Clause and the Proposed Statutory Revision, 8 La. L.Rev. 113, 114 (1947). Moreover, the current constitution seems to suggest more flexibility in the title-object requirement because "added was the reference . . . to a 'brief title.' " Lee Hargrave, *The Louisiana Constitution: A Reference Guide* 55 (1990).

We conclude that construing the word "should" as permissive does not violate the title-object requirement. The lengthy title (which is not enacted into law), while indeed including mandatory language, is not inconsistent with the object of the statute, as finally enacted, of advising, but not requiring, the Legislature to seek the Department's recommendation.

Plaintiffs further contend that the verb "should" is the past tense of the verb "shall," citing in support the definition of "should" as "was obliged to;" "*past of* SHALL" in *Webster's New Collegiate Dictionary* 1065 (1979).

The modern rule rejects this "arcane" meaning and instead defines "should" as "the weaker companion to the obligatory 'ought.' " *State v. Thomas*, 528 So.2d 1274, 1275 (Fla. 3d DCA 1988) (citing *Texas & P. R. Co. v. Consolidated Companies*, 180 La. 180, 187, 156 So. 215, 217 (1934), in which this court ruled "[t]he word 'should' in the rule which the plaintiff invokes is directory. Being directory, a deviation is excusable under proper circumstances.") A similar definition of "should" appears in Byran A. Garner, *A Dictionary of Modern Legal Usage* 396 (1987), which provides:

> *Ought* should be reserved for expressions of necessity, duty, or obligation; *should*, the weaker

word, expresses mere appropriateness, suitability, or fittingness.

The modern view is that " 'should' generally denotes discretion and should not be construed as 'shall.' " 3 Norman J. Singer, *Sutherland Statutory Construction* § 57.03 (5th Ed.1992). Furthermore, "when a statute is amended and the shift in language is from 'shall' to 'may' there is clear manifestation of intent that the statute be permissive." *Id.* Still further, "[w]here both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings." *Id.* at § 57.11.

Applying those principles, we conclude that the Legislature's use of the word "should" was clearly intended to be permissive. Not only was the statute reworded from "shall" to "should" in the legislative enactment process, but also the statute itself contains the word "should" in three places referring to the Legislature and the word "shall" in three places referring to the Department. This use of both mandatory and directory verbs scattered throughout this statute clearly evidences the Legislature's intent to differentiate the meaning of the terms.

In sum, we conclude that former La.Rev.Stat. 56:640.3 was merely a hortatory provision directing that the Legislature, as a policy matter, seek a recommendation from the Department. While a mandatory requirement of biological data to suggest a legislative change in fishing methods might have been a wiser policy decision, the prudence of the 1986 legislation is not before the court.

Plaintiffs' arguments are persuasive, but the underlying premise for the trial court's holding that plaintiffs possessed a vested incorporeal right to fish commercially is legally erroneous. Accordingly, Act 1316 did not result in a taking of any property right – corporeal or incorporeal – possessed by plaintiffs.[12]

Equal Protection

The trial court declared unconstitutional on equal protection grounds the requirement set forth in La.Rev.Stat. 56:305B(14)(a) that applicants for a commercial rod and reel license "must provide positive proof that they held a valid commercial gear license for gill nets during any two years of the years 1995, 1994, and 1993."

The first step in the analysis of this issue is to define the appropriate level of constitutional scrutiny. Given the economic nature of the gear licensing regulation at issue, we conclude that the rational basis standard applies. *See*

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[12] While plaintiffs obliquely suggest that the Legislature's inclusion of mitigatory measures in Act 1316 was an acknowledgment of a compensable taking, other states have likewise included such buy-back provisions in their gill net regulations despite the lack of any legal mandate compelling them to do so. *See* Christopher L. Koch, *A Constitutional Analysis of Limited Entry*, in *Limited Entry as a Fishery Management Tool* 251, 266 (1978) (noting that despite the lack of a legal obligation to compensate harmed fishermen, a legislature may nonetheless deem it appropriate to include a buy-back program to assist economically dislocated fishermen); Alexandra M. Renard, *Will Florida's New Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fishery Restrictions*, 10 J. Land Use & Envtl. L. 273, 290 (1995) (noting states "politically sensitive to these hardships" have included such mitigatory measures).

Moore v. RLCC Technologies, Inc., 95-2621 (La.2/28/96); 668 So.2d 1135, 1143 (noting that the "rational basis standard traditionally [is] applied to legislation involving economics and social welfare" and police power); *see also Lane v. Chiles*, 698 So.2d 260 (Fla.1997) (because fishing is not a fundamental right and commercial fishermen do not constitute a suspect class, the rational basis test applies); *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370, 1382 (E.D.La.1978); *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (upholding a ban on pushcart vendors in the French Quarter, along with a grandfather provision, under the rational basis standard).

Under the rational basis standard, great deference is given to legislative determinations. A classification is constitutional if it has some reasonable basis. A classification "does not offend the constitution simply because [it] is not made with mathematical nicety or because in practice it results in some inequality." *Bazley v. Tortorich*, 397 So.2d 475, 484 (La.1981).

The apparent purpose of the new rod and reel license is to mitigate the hardship caused by Act 1316 on former gill netters by allowing an alternative means of commercial fishing for those who previously used gill nets. This type of licensing restriction places a moratorium on the licensing of new entrants into the state fisheries. *See* John A. Duff and William C. Harrison, *The Law, Policy, and Politics of Gillnet Restrictions in State Waters of the Gulf of Mexico*, 9 St. Thomas L.Rev. 389, 397 n. 78 (1997) (noting the similarity between the Louisiana and Alabama provision which both contain this type of requirement of prior gill net licenses). Given the mitigatory aim of the rod and

reel provision in general, coupled with the specific pragmatic purpose of this requirement to restrict entry into the commercial fisheries market, we conclude the classification has a rational basis and reverse the district court's finding of unconstitutionality.

Decree

Accordingly, the judgment of the trial court, declaring La.Rev.Stat. 56:13.1 and La.Rev.Stat.56:305B(14)(a) unconstitutional and permanently enjoining the enforcement of those provisions, is reversed.

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 97/CA/1344

LOUISIANA SEAFOOD MANAGEMENT COUNCIL; DELTA COMMERCIAL FISHERIES ASSOCIATION, LAWRENCE "BROTHER" STIPELCOVICH; LAKE PONTCHATRAIN FISHERMAN'S ASSOCIATION, PETER GERICA; ET AL

--VERSUS--

LOUISIANA WILDLIFE AND FISHERIES COMMISSION; LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

Parish of East Baton Rouge

On application for Rehearing.

Rehearing DENIED

/s/ Frank Foil
Frank Foil

/s/ James E. Kuhn
James E. Kuhn

/s/ Remy Chiasson
Remy Chiasson

Filed NOV 02 1998

/s/ Christine L. Crow
Christine L. Crow, Clerk

The Supreme Court of the State of Louisiana

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, ET AL

VS. NO. 98-C - 2944

LOUISIANA WILDLIFE AND FISHERIES COMMISSION, ET AL

IN RE: Louisiana Seafood Manag.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First circuit, Number CA97 1344; Parish of East Baton Rouge 19th Judicial District Court Div. "D" Number 419,467

January 29, 1999

Denied.

WFM

PFC

HTL

BJJ

JPV

CDT

JTK

KIMBALL, J. not on panel; recused.

Supreme Court of Louisiana
January 29, 1999

/s/ John Olivier
Clerk of Court For the Court